TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 255.

THE COUNTY OF WARREN, PLAINTIFF IN ERROR,

vs.

THE PORTSMOUTH SAVINGS BANK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 18, 1875.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms in the city of Chicago, in the district aforesaid, before the judges thereof, on Tuesday, the fifth day of January, in the year of our Lord one thousand eight hundred and seventy-five, in the December term, in the year of our Lord one thousand eight hundred and seventy-four, and of our Independence the ninety-ninth year.

WILLIAM H. BRADLEY, *Clerk.*

PORTSMOUTH SAVINGS BANK
vs.
THE COUNTY OF WARREN. } Assumpsit.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the twenty-ninth day of July, A. D. 1873, came said plaintiff, the Portsmouth Savings Bank, by Isaac G. Wilson, its attorney, and filed in the office of the clerk of the circuit court of the United States for said district, at Chicago, in the district
2 aforesaid, its præcipe and bond for costs, which said præcipe and bond for costs are respectively in the words and figures following, to wit:

Præcipe.

Circuit court of the United States for the northern district of Illinois.

PORTSMOUTH SAVINGS BANK
vs.
BOARD OF SUPERVISORS OF WARREN COUNTY. } Assumpsit.

The clerk will please issue a writ of summons in the above-entitled suit, in an action of trespass on the case upon promises, directed to the marshal of said district, and returnable to the next term of said court. Damages, $12,000.

ISAAC G. WILSON,
Pl'ff's Att'y.

CHICAGO, *July* 29, 1873.

(Endorsed:) Filed July 29, '73. W'm H. Bradley, cl'k.

Bond for costs.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court, October term, A. D. 1873.

PORTSMOUTH SAVINGS BANK
vs.
BOARD OF SUPERVISORS OF WARREN COUNTY. } In assumpsit.

3 I enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court; and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by it, I hereby agree and stipulate that execution may issue against my property for any costs taxed against it.

Dated this 29th day of July, A. D. 1873.

ISAAC G. WILSON.

(Endorsed:) Filed July 29th, A. D. 1873. W'm H. Bradley, clerk.

4 And on the same day, to wit, the 29th day of July, A. D. 1873, a writ of summons issued out of said clerk's office against said defendant, in said-entitled cause, which said writ, together with the return of the marshal annexed thereto, is in the words and figures following, to wit:

Writ of summons.

Circuit court of the United States of America, northern district of Illinois, *ss:*

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you to summon Board of Supervisors of Warren County, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of October next, to answer unto Portsmouth Savings Bank of a plea of trespass on the case upon promises, to its damage, as it alleges, of twelve thousand dollars, and have you then and there this writ.

Witness the Hon. Nathan Clifford, Acting Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 29th day of July, in the year of our Lord one thousand eight hundred
5 and seventy-three, and of our Independence the 98th year.

[SEAL.] W'M H. BRADLEY, *Clerk.*

Special deputy's return.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Know all men by these presents that I have appointed, and by these presents do appoint, William Cuthbert my true and lawful deputy to execute the annexed writ, Portsmouth Savings Bank vs. Board of Supervisors of Warren County, and to make true return of the execution thereof according to law.

[SEAL.] B. H. CAMPBELL,
United States Marshal for the Northern District of Illinois.

I have, this ninth day of September, A. D. 1873, executed the annexed writ by delivering a true copy thereof to C. W. Boydston, the chairman of the said board of supervisors, and also by delivering a true copy thereof to Wallace G. Bone, the clerk of said board of supervisors therein named.

B. H. CAMPBELL,
United States Marshal for the Northern District of Illinois,
By W'M L. CUTHBERT,
Special Deputy.

W'm Cuthbert, being first duly sworn, deposes and says that he served the annexed writ as stated in the foregoing return.

6 Sworn to before me this 9th day of September, A. D. 1873.

[SEAL.] JAMES L. DRYDEN,
Circuit Clerk W. C., Ill's.

(Endorsed:) Filed Sept. 12th, A. D. 1873. W'm H. Bradley, clerk.

7 Afterwards, to wit, on the 18th day of September, A. D. 1873, said plaintiff, by its attorney, filed in said clerk's office his declaration in said entitled cause, which said declaration is in the words and figures following, to wit:

Declaration.

In the circuit court of the United States, northern district of Illinois, of the October term, A. D. 1873.

The Portsmouth Savings Bank, a corporation created by & existing under and by virtue of the laws of the State New Hampshire, and located and doing business at Portsmouth, in said State of New Hampshire, plaintiff in this suit, by Isaac G. Wilson, its attorney, complains of The Board of Supervisors of Warren County, said county being a county organized under the township-organization laws of the State of Illinois, and is located within said northern district of Illinois, defendant in this suit, being summoned, &c., in a plea of trepass on the case upon premises.

For that heretofore, to wit, on the 25th day of January, 1871, at and within the northern district aforesaid, said county of Warren, by
8 its duly-authorized officers and authorities, and by virtue of the laws of the State of Illinois, made, executed, and delivered to the Rockford, Rock Island and S't Louis Railroad Company its bonds, to wit, two hundred bonds, numbered, respectively, 1 to 200, inclusive, for the sum of one thousand dollars each, in and by each of which said bonds said County of Warren promised to pay to said Rockford, Rock Island and S't Louis Railroad Company, or bearer, the sum of one thousand dollars, on the first day of July, 1890, with interest thereon at the rate of eight per annum, payable annually on the first day of July in each year; to each of said bonds were attached twenty coupons, duly executed by the legal authorities of said Warren County, in and by each of which said coupons said county promised to pay to the bearer thereof, at the office of the treasurer of said county, eighty dollars for the several installments of interest to become due and payable on each of said bonds at the times such interest by the terms of said bonds should become due and payable.

And the plaintiff avers that afterwards, and before any of said coupons became due, to wit, on the 30th day of January, A. D. 1871,
9 the said Rockford, Rock Island and S't Louis Railroad Company transferred and delivered to said plaintiff twenty-five of said interest coupons, maturing and falling due July 1st, 1871, and numbered, respectively, 31 to 37, inclusive, and 83 to 100, inclusive, and twenty-five of said interest coupons, numbered as last aforesaid, maturing and falling due July 1st, 1872, and twenty-five of said coupons, also numbered as last aforesaid, and maturing and falling due July 1st, 1873; whereby the plaintiff became and ever since has been and still is the bearer, holder, and owner thereof, and entitled to receive and demand of and from said County of Warren the several sums of money mentioned in each of said coupons; and the plaintiff avers that said County of Warren, in consideration of the premises, to wit, at and within the district aforesaid, heretofore, to wit, on said 30th day of January, 1871, promised said plaintiff to pay it the amount due on each one and all of said coupons, according to their tenor and effect; yet, though each and all of said coupons long since became due and payable, the said defendant,

though requested, has not paid the same, nor any part thereof,
10 but so to do has neglected and refused, to the plaintiff damages of twelve thousand dollars; and also for that whereas the said defendant heretofore, to wit, on the 10th day of July, in the year of our Lord one thousand eight hundred and seventy-three, at and within said district, became and was indebted to the said plaintiff in the sum of twelve thousand ($12,000) dollars of lawful money of the United States of America, for divers goods, wares, and merchandise by the said plaintiff before that time sold and delivered to the defendant, and at the special instance and request of the said defendant, and, being so indebted to the said plaintiff, the said defendant, in consideration thereof, afterward, to wit, on the same day and year, and at the place aforesaid, to wit, at said northern district of Illinois, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned, when the said defendant should be thereunto afterward requested.

And whereas also the said defendant afterward, to wit, on the same day and year and at the place aforesaid, in consideration that the said plaintiff had before that time, at the like special instance and
11 request of the said defendant, sold and delivered to the said defendant divers other goods, wares, and merchandise of the said plaintiff, the said defendant then and there undertook and faithfully promised the said plaintiff that the said defendant would well and truly pay to the said plaintiff so much money as the last-aforesaid goods, wares, and merchandise at the time of sale and delivery thereof were reasonably worth, when the said defendant should be thereunto afterward requested; and the said plaintiff avers that the said goods, wares, and merchandise last mentioned, at the time of sale and delivery thereof, were reasonably worth the further sum of twelve thousand ($12,000) dollars, of like lawful money as aforesaid, to wit, at the place aforesaid, whereof the said defendant afterward, on the same day and year and at the place aforesaid, had notice.

And whereas also the said defendant afterward, to wit, on the same day and year and at the place aforesaid, became and was indebted to the said plaintiff in the further sum of twelve thousand ($12,000) dollars, of like lawful money as aforesaid, for money before that time lent and advanced by the said plaintiff to the said defendant, and at the
12 like request of the said defendant, and in the like sum for other money by the said plaintiff before that time paid, laid out, and expended for the said defendant and at the request of the said defendant, and in the like sum for other money by the said defendant before that time had and received to and for the use of the said plaintiff, and in like sum for other money before that time and then due and owing the said plaintiff for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from said defendant to said plaintiff, and in the like sum for the price and value of work then done and material for the same provided by the plaintiff for the defendant, and at the like special request of the defendant.

And being so indebted, the said defendant, in consideration thereof, afterward, to wit, on the same day and year and at the place aforesaid, to wit, at said northern district of Illinois, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the several sums of money in this count mentioned when
13 the said defendant should be thereunto afterward requested.

And whereas also the said defendant afterward, to wit, and the same day and year and at the place aforesaid, accounted together with the said plaintiff of and concerning divers other sums of money before

that time due and owing from the said defendant to the said plaintiff, and then and there being in arrear and unpaid; and upon such accounting the said defendant then and there was found to be in arrear and indebted to the said plaintiff in the further sum of twelve thousand ($12,000) dollars of the like lawful money as aforesaid.

And being so found in arrear and indebted to the said plaintiff, and the said defendant in consideration thereof afterward, to wit, on the same day and year, at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned when the said defendant should be thereunto afterward requested.

Nevertheless the said defendant (although often requested, &c.) has not yet paid the several sums of money above mentioned, or any
14 or either of them, or any part thereof, to the said plaintiff, but to pay the same or any part thereof to the said plaintiff the said defendant has hitherto altogether refused and still does refuse, to the damage of the said plaintiff twelve thousand ($12,000) dollars; and therefore the said plaintiff brings suit.

ISAAC G. WILSON,
Plaintiff's Attorney.

Copy of the account sued on.

The plaintiff's sole and only cause of action is seventy-five interest coupons, numbered respectively 31 to 37 inclusive, and 83 to 100 inclusive, copies of which said coupons are hereto attached.

Said coupons were originally a part of twenty bonds, for $100 dollars each, issued by the authority of Warren County, State of Illinois, to the Rockford, Rock Island and St Louis Railroad Company, bearing date January 25th, 1871, and numbered as above, a copy of one of which said bonds is filed herewith. Upon each of said coupons maturing July 1st, 1871, there is endorsed, "Thirteen and $\frac{33}{100}$ dollars of this coupon is canceled."

15 The Board of Supervisors of Warren County to the Portsmouth Savings Bank, Dr.

To money lent and advanced	$12,000
To money paid, laid out, and expended	$12,000
To money had and received to and for use of the said plaintiff	$12,000
To goods, wares, and merchandise sold & delivered	$12,000
To labor, services, & material	$12,000
To balance due on account stated	$12,000

16 *Copy of coupons on which suit is brought.*

[$80.]

On the first day of July, A. D. 1871, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.

No. 31. W. G. BONE,
Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1871, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.

No. 32. W. G. BONE,

Clerk of the County Court of Warren County.

17

[$80.]

On the first day of July, A. D. 1871, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.

No. 33. W. G. BONE,

Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1871, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.

No. 34. W. G. BONE,

Clerk of the County Court of Warren Co.

[$80.]

On the first day of July, A. D. 1871, the County of Warren, in the State of Illinois, will pay the *the* bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.

No. 35. W. G. BONE,

Clerk of the County Court of Warren County.

18

[$80.]

On the first day of July, A. D. 1871, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.

No. 36. W. G. BONE,

Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1871, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.

No. 37. W. G. BONE,

Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1871, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.

No. 83. W. G. BONE,

Clerk of the County Court of Warren County.

19 [$80.]

On the first day of July, A. D. 1871, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.
No. 84. W. G. BONE,
Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1871, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.
No. 85. W. G. BONE,
Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1871, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.
No. 86. W. G. BONE,
Clerk of the County Court of Warren County.

20 [$80.]

On the first day of July, A. D. 1871, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.
No. 87. W. G. BONE,
Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1871, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said Warren County, annual interest on bond.
No. 88. W. G. BONE,
Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1871, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said Warren County, annual interest on bond.
No. 89. W. G. BONE,
Clerk of the County Court of Warren Co.

21 [$80.]

On the first day of July, A. D. 1871, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.
No. 90. W. G. BONE,
Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1871, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.

No. 91. W. G. BONE,
Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1871, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.

No. 92. W. G. BONE,
Clerk of the County Court of Warren County.

22 [$80.]

On the first day of July, A. D. 1871, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.

No. 93. W. G. BONE,
Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1871, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.

No. 94. W. G. BONE,
Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1871, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.

No. 95. W. G. BONE,
Clerk of the County Court of Warren County.

23 [$80.]

On the first day of July, A. D. 1871, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.

No. 96. W. G. BONE,
Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1871, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.

No. 97. W. G. BONE,
Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1871, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.

No. 98. W. G. BONE,
Clerk of the County Court of Warren County.

24 [$80.]

On the first day of July, A. D. 1871, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.

No. 99. W. G. BONE,
Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1871, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.

No. 100. W. G. BONE,
Clerk of the County Court of Warren County.

On the back of each of the foregoing is the following endorsement: "Thirteen and $\frac{33}{100}$ dollars of this coupon is cancelled."

25 [$80.]

On the first day of July, A. D. 1872, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.

No. 31. W. G. BONE,
Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1872, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.

No. 32. W. G. BONE,
Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1872, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.

No. 33. W. G. BONE,
Clerk of the County Court of Warren County.

26 [$80.]

On the first day of July, A. D. 1872, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.

No. 34. W. G. BONE,
Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1872, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.

No. 35. W. G. BONE,

Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1872, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.

No. 36. W. G. BONE,

Clerk of the County Court of Warren County.

27

[$80.]

On the first day of July, A. D. 1872, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.

No. 37. W. G. BONE,

Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1872, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.

No. 83. W. G. BONE,

Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1872, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.

No. 84. W. G. BONE,

Clerk of the County Court of Warren County.

28

[$80.]

On the first day of July, A. D. 1872, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.

No. 85. W. G. BONE,

Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1872, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.

No. 86. W. G. BONE,

Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1872, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.
No. 87.
W. G. BONE,
Clerk of the County Court of Warren County.

29

[$80.]

On the first day of July, A. D. 1872, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.
No. 88.
W. G. BONE,
Clerk of the County Court of Warren County.

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On the first day of July, A. D. 1872, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.
No. 89.
W. G. BONE,
Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1872, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.
No. 90.
W. G. BONE,
Clerk of the County Court of Warren County.

30

[$80.]

On the first day of July, A. D. 1872, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.
No. 91.
W. G. BONE,
Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1872, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.
No. 92.
W. G. BONE,
Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1872, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.
No. 93.
W. G. BONE,
Clerk of the County Court of Warren County.

31 [$80.]

On the first day of July, A. D. 1872, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of the said county of Warren, annual interest on bond.
No. 94. W. G. BRINE,
Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1872, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.
No. 95. W. G. BONE,
Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1872, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.
No. 96. W. G. BONE,
Clerk of the County Court of Warren County.

32 [$80.]

On the first day of July, A. D. 1872, the County of Warren, in the States of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.
No. 97. W. G. BONE,
Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1872, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.
No. 98. W. G. BONE,
Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1872, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.
No. 99. W. G. BONE,
Clerk of the County Clerk *of Warren County.*

33 [$80.]

On the first day of July, A. D. 1872, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.
No. 100. W. G. BONE,
Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1873, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.
No. 31. W. G. BONE,
Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1873, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.
No. 32. W. G. BRINE,
Clerk of the County Court of Warren County.

34 [$80.]

On the first day of July, A. D. 1873, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.
No. 33. W. G. BONE,
Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1873, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.
No. 34. W. G. BONE,
Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1873, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.
No. 35. W. G. BONE,
Clerk of the County Court of Warren County.

35 [$80.]

On the first day of July, A. D. 1873, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.
No. 36. W. G. BONE,
Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1873, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.
No. 37. W. G. BONE,
Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1873, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.
No. 83.
W. G. BONE,
Clerk of the County Court of Warren County.

36 [$80.]

On the first day of July, A. D. 1873, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.
No. 84.
W. G. BONE,
Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1873, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.
No. 85.
W. G. BONE,
Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1873, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.
No. 86.
W. G. BONE,
Clerk of the County Court of Warren County.

37 [$80.]

On the first day of July, A. D. 1873, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.
No. 87.
W. G. BONE,
Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1873, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.
No. 88.
W. G. BONE,
Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1873, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.
No. 89.
W. G. BONE,
Clerk of the County Court of Warren County.

38 [$80.]

On the first day of July, A. D. 1873, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.
No. 90. W. G. BONE,
Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1873, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of the said county of Warren, annual interest on bond.
No. 91. W. G. BONE,
Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1873, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.
No. 92. W. G. BONE,
Clerk of the County Court of Warren County.

39 [$80.]

On the first day of July, A. D. 1873, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.
No. 93. W. G. BONE,
Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1873, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.
No. 94. W. G. BONE,
Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1873, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.
No. 95. W. G. BONE,
Clerk of the County Court of Warren County.

40 [$80.]

On the first day of July, A. D. 1873, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of the said county of Warren, annual interest on bond.
No. 96. W. G. BONE,
Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1873, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.

No. 97. W. G. BONE,
Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1873, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.

No. 98. W. G. BONE,
Clerk of the County Court of Warren County.

41 [$80.]

On the first day of July, A. D. 1873, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of the treasurer of said county of Warren, annual interest on bond.

No. 99. W. G. BONE,
Clerk of the County Court of Warren County.

[$80.]

On the first day of July, A. D. 1873, the County of Warren, in the State of Illinois, will pay the bearer eighty dollars, at the office of treasurers of said county of Warren, annual interest on bond.

No. 100. W. G. BONE,
Clerk of the County Court of Warren County.

(Endorsed:) Filed Sept. 18, 1873. W'm H. Bradley, clerk.

42 Afterwards, to wit, on the 1st day of November, A. D. 1873, said defendant, by its attorneys, filed in said clerk's office its pleas in said entitled cause; which said pleas are in the words and figures following, to wit:

Pleas.

In the circuit court of the United States for the northern district of Illinois, October term, A. D. 1873.

THE PORTSMOUTH SAVINGS BANK
vs.
THE BOARD OF SUPERVISORS OF WARREN County. } Assumpsit.

1. And now come the said defendants, by Harding, McCoy and Pratt, their attorneys, and, without waiving petition to stay this suit already filed, defend the wrong and injury, when, &c., and for plea say at the said time, when, &c., they did not assume and promise in manner and form as the plaintiff hath above declared against them, and of this the defendants put themselves upon the country, &c.

HARDING, McCOY & PRATT,
Def't's Att'ys.

* * * * * * *

And for further plea in this behalf, the defendants say actio non, because they say that the said several causes of action in the several counts of the plaintiff's declaration mentioned are one and the same, and not other or different, as by said declaration is supposed; and defendants aver that the sole and only cause or causes of action in this
43 suit are the coupons mentioned in the first count of the said plaintiff's declaration. And defendants aver that long prior to the commencement of this suit, to wit, on the 15th day of July, A. D. 1873, one Abner C. Harding, Harding I. Merrill, Edward E. Tollman, and John O. Wheeler, tax-payers and property-holders in said county of Warren, in behalf of themselves and of all other tax-payers, property-holders and residents of said county, impleaded the said plaintiff and filed their certain bill in chancery in the circuit court of the county of Warren and State of Illinois against him, the said plaintiff, and these defendants, the Board of Supervisors of said Warren County, the Rockford, Rock Island and S't Louis Railroad Company, and Wallace G. Bone, making the said plaintiff, and all other unknown owners of said bonds and coupons, parties defendant therein, by the name and style of unknown owners of the bonds and coupons described in the said declaration, and of the entire issue of bonds and coupons therein described. By and in which said bill the complainants therein allege that all the said bonds and coupons were and are unlawful, unauthorized, null, and void; that the same were issued without lawful authority, and in fraud of the rights of complainants and other tax-payers of said county, of which the plaintiffs had notice. And the said complainants in
44 said bill pray that all the said bonds and coupons may be by said court declared to be null and void and for nothing esteemed, and that the unknown owners of said bonds and coupons should be perpetually enjoined from prosecuting the said County of Warren by reason thereof. And said defendant avers that said plaintiff was and is a party litigant in said suit, as one of the unknown owners of the said bonds and coupons; that the said bonds and coupons are the subject-matter of the said suit, which has been commenced and is now being prosecuted under the laws of the State of Illinois, to determine the question of the validity and legality of said bonds and coupons; that the said circuit court of said Warren County, before the commencement of this suit, obtained jurisdiction of all the parties defendant to said bill and of the subject-matter thereof, and that said suit is still pending and undetermined in said court. And defendants aver that all the matters and questions involved in this suit are also involved in and the subject-matter of the said suit in chancery so now pending and undetermined as aforesaid, which the defendants are ready to verify; wherefore they pray judgment, &c.

HARDING, McCOY & PRATT,
Def't's Att'ys.

(Endorsed:) Filed Nov. 1, 1873. W'm H. Bradley, cl'k.

45 Afterwards, to wit, on the 10th day of December, A. D. 1873, said plaintiff, by its attorneys, filed in said clerk's office its demurrer to the sixth plea of said defendants in said entitled cause; which said demurrer is in the words and figures following, to wit:

46 *Demurrer to sixth plea.*

In the circuit court of the United States for the northern district of Illinois.

THE PORTSMOUTH SAVINGS BANK
vs.
THE BOARD OF SUPERVISORS OF WARREN County. } Assumpsit.

And the said plaintiff, as to the said plea of said defendant by it sixthly above pleaded, says precludi non, because it says that said plea and the matters and things therein contained are not sufficient in law to bar or preclude said plaintiff from having or maintaining his aforesaid action thereof against said defendant, and said plaintiff is not bound by law to answer the same, and this the said plaintiff is ready to verify; wherefore, by reason of the insufficiency of said plea in this behalf, the said plaintiff prays judgment and its damages by reason of said defendant not performing the said several promises and undertakings in the said declaration mentioned, &c.

By ISAAC G. WILSON,
Attorney for Plaintiff.

(Endorsed:) Filed Dec. 10, 1873. W'm H. Bradley, cl'k.

47 Afterwards, to wit, on the 20th day of December, A. D. 1873, in the December term of said court, in the record of the proceedings thereof in said-entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

PORTSMOUTH SAVINGS BANK
vs.
THE BOARD OF SUPERVISORS OF WARREN County. } Assumpsit.

Now come the parties, by their attorneys, and now comes on to be heard the demurrer of the plaintiff to the sixth plea of the defendant, filed herein, and, after hearing the arguments of counsel, the court sustains said demurrer.

48 Afterwards, to wit, on the 6th day of July, A. D. 1874, said parties, by their attorneys, filed in said clerk's office their stipulation in said-entitled cause; which said stipulation is in the words and figures following, to wit:

Stipulation as to pleadings.

In the circuit court of the United States for the northern district of Illinois.

AUGUSTUS T. POST
v.
BOARD OF SUPERVISORS OF WARREN COUNTY.

GEORGE O. MARCY
v.
SAME.

THE PORTSMOUTH SAVINGS BANK
v.
SAME.

It is hereby stipulated in the above entitled three suits that the said defendant may, under the plea of the general issue, put in any defence which the court may deem competent, with like effect as if such defence were specially pleaded, and that said several plaintiffs may in like manner, under said issue, put in any competent testimony by way of rebuttal; and all special pleas, replications, and rejoinders are hereby waived, except the defendant's sixth plea, to which the court has heretofore sustained a demurrer, in relation to which said defendant retains all right and benefit of exception to the ruling of the court in sustaining said demurrer, and that this cause may be tried before the judges of this court without a jury.

49 WILSON & PERRY,
For Portsmouth Sa. Bank.
CHARLES M. OSBORN,
For August. T. Post and for Geo. D. Marcy.
LAWRENCE & HARDING,
For Def'ts.

(Endorsed:) Filed July 6, '74. W'm H. Bradley, cl'k.

And on the same day, to wit, the 6th day of July, A. D. 1874, in the July term of said court, in the record of the proceedings thereof in said entitled-cause, before the Hon. David Davis, one of the
50 justices of the Supreme Court, and the Hon. Thomas Drummond, circuit judge, is the following entry, to wit:

PORTSMOUTH SAVINGS BANK
vs.
THE BOARD OF SUPERVISORS OF WARREN County. } Assumpsit.

Now come the parties, by their attorneys, and upon issue joined thereupon by agreement of the parties, by their attorneys, as per stipulation filed, they waive the intervention of a jury, and for trial put themselves upon the court, and after hearing the evidence and a part of the arguments of counsel, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

Afterwards, to wit, on the 7th day of July, A. D. 1874, in the said July term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. David Davis, one of the justices of the Supreme Court, and the Hon. Thomas Drummond, circuit judge, is the following entry, to wit:

PORTSMOUTH SAVINGS BANK
vs.
THE BOARD OF SUPERVISORS OF WARREN County. } Assumpsit.

Now come again the parties, by their attorneys, and after hearing additional arguments of counsel upon the issue herein, without concluding the same, the hour of adjournment having arrived, the further
51 hearing is postponed to a future day of the term.

Afterwards, to wit, on the 9th day of July, A. D. 1874, in the said July term of said court, in the record of the proceedings thereof in said-entitled cause, before the Hon. David Davis, one of the justices of the Supreme Court, and the Hon. Thomas Drummond, circuit judge, is the following entry, to wit:

PORTSMOUTH SAVINGS BANK
vs.
THE BOARD OF SUPERVISORS OF WARREN County. } Assumpsit.

Now come again the parties, by their attorneys, and after hearing additional arguments of counsel upon the issues herein, without concluding the same, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

Afterwards, to wit, on the 10th day of July, A. D. 1874, in the said July term of said court, in the record of the proceedings thereof in said-entitled cause, before the Hon. David Davis, one of the justices of the Supreme Court, and the Hon. Thomas Drummond, circuit judge, is the following entry, to wit:

PORTSMOUTH SAVINGS BANK
vs.
THE BOARD OF SUPERVISORS OF WARREN County. } Assumpsit.

52 Now come again the parties, by their attorneys, and after hearing the concluding arguments of counsel upon the issue herein, the court, not being sufficiently advised in the premises, takes time to consider.

Afterwards, to wit, on the 5th day of January, A. D. 1875, in the December term, A. D. 1874, of said court, in the record of the proceedings thereof in said-entitled cause, before the Hon. Thomas Drummond, judge, is the following entry, to wit:

PORTSMOUTH SAVINGS BANK
v.
THE BOARD OF SUPERVISORS OF WARREN County. } Assumpsit.

The court, having considered and being now sufficiently advised upon the matters heretofore submitted herein, finds the issue for the plaintiff, and assesses its damages to the sum of six thousand four hundred and ninety-nine dollars and forty-seven cents.

It is thereupon considered and adjudged by the court that the plaintiff do have and recover of the defendant the said sum of six thousand four hundred and ninety-nine dollars and forty-seven cents, its damages so as aforesaid assessed, together with its costs and charges in this behalf expended, amounting to the sum of dollars and cents.

53 Afterwards, to wit, on the 23d day of January, A. D. 1875, said parties, by their attorneys, filed in said clerk's office their stipulation in said-entitled cause, which said stipulation is in the words and figures following, to wit:

Stipulation.

United States circuit court for the northern district of Illinois, of the December term, A. D. 1874, *ss:*

AUGUSTUS T. POST, PLAINTIFF,
vs.
THE BOARD OF SUPERVISORS OF WARREN County, defendant.

GEORGE O. MARCY
vs.
THE SAME DEFENDANT.

THE PORTSMOUTH SAVINGS BANK
vs.
THE SAME DEFENDANT.

In the three cases above named the several plaintiffs and the defendant, by their respective attorneys, shew to the court here that after the commencement of said actions, to wit, on the first day of July, A. D. 1874, an act of the general assembly of the State of Illinois went into effect changing the name of the said defendant from "The Board of Supervisors of Warren County" to "The County of Warren," and
54 directing that all suits against the defendant should be conducted in that name. That, in ignorance of the passage of said act, the said judgment was at the present term of this court entered in said causes against the said defendant by the name of "The Board of Supervisors of Warren County," and appeal-bonds and writs of error and supersedeas have been issued and made, naming the said defendant as "The Board of Supervisors of Warren County," and the said plaintiffs severally and the said defendant pray the court to correct the record in this cause and the said writs of error and supersedeas to correspond with the fact, and to allow proper appeal-bonds to be filed nunc pro tunc; and to that end they do stipulate that such corrections may be made and proper appeal-bonds filed as the court shall deem proper.

AUGUSTUS T. POST,
By CHARLES M. OSBORN,
His Attorney.
GEORGE O. MARCY,
By CHARLES M. OSBORN,
His Attorney.
THE PORTSMOUTH SAVINGS BANK,
By WILSON & PERRY,
Its Attorneys.

Subject to the stipulation below, which is also to be executed by pl'ffs, I sign this stipulation aforesaid.

GEO. F. HARDING,
Att'y for Def't.

It is further stipulated that the pl'ffs will take no exception or
55 objection to the power of the chairman of the board and of the clerk of said board to execute new bonds in the name of the county in lieu of the said bonds, said board to pass at a subsequent ses-

sion a resolution conferring in express terms such power, if need be, in the judgment of the pl'ffs, upon the said chairman and said clerk.

GEO. F. HARDING,
For Def't.
AUGUST. T. POST,
By CHA'S M. OSBORN,
His Attorney.
GEORGE O. MARCY,
By CHA'S M. OSBORN,
His Attorney.
THE PORTSMOUTH SAVINGS BANK,
By WILSON & PERRY,
Its Att'ys.

(Endorsed:) Filed Jan'y 23, '75. W'm H. Bradley, cl'k.

56 Afterwards, to wit, on the 23d day of January, A. D. 1875, in the said December term, A. D. 1874, of said court, in the record of the proceedings thereof in said-entitled cause, before the Hon. Thomas Drummond, judge, is the following entry, to wit:

PORTSMOUTH SAVINGS BANK
v.
THE COUNTY OF WARREN } Assumpsit.

It appearing to the court, by stipulation of counsel herein filed, that the judgment in this cause, entered on the fifth day of January, A. D. eighteen hundred and seventy-five, was inadvertently entered against the defendant by the name of the Board of Supervisors of Warren County, whereas the name of said corporation had then been changed by act of the legislature to the County of Warren. It is therefore ordered that a judgment be entered now as of that date against the County of Warren.

It is thereupon considered and adjudged by the court that the plaintiff do have and recover of the defendant, the County of Warren, the said sum of six thousand four hundred and ninety-nine dollars and forty-seven cents, its damages so as aforesaid assessed, together with its costs and charges in this behalf expended, amounting to the sum of dollars and cents.

57 *Special finding by the court.*

PORTSMOUTH SAVINGS BANK
v.
THE COUNTY OF WARREN

This cause having been submitted to the court, by agreement in writing, without the intervention of a jury, and besides interposing the various statutes of the State bearing on the subject, the following facts were proven, to wit:

That the plaintiff at the commencement of this suit was the holder of coupons of the bonds of the county of Warren, bought by him for value before maturity and without actual notice of their alleged invalidity or of any suit in relation thereto (as to which coupons and the amount due thereon there was no controversy, but only as to the liability of the county thereon); that at the time of the maturity of the several coupons, and ever since, the county denied the validity of the same.

That the said coupons were for the annual interest on certain bonds of the county of Warren, which, to the amount of two hundred thousand dollars, of the form and denomination described in the declaration, were executed on January 25th, 1871, under the hand of the clerk of the board of supervisors of Warren County, and with the seal of the county, by order of a majority of the members of said board, at a meeting of the said board held on said day, and then delivered by said clerk,
58 as directed by the majority of the board, to the Rockford, Rock Island & S't Louis R. R. Company, in payment of a subscription of a like amount to the stock of said company, which purported to be made in March, 1870, in the name of said county, by the chairman of said board, in pursuance of an order of said board, as hereinafter stated; said bonds were registered in the office of the county clerk of Warren County, and so certified by the clerk January 25th, 1871, and were registered Jan'y 27th, 1871, in the office of the State auditor of public accounts, and so certified by the auditor, the certificate of the clerk and auditor being on each of said bonds.

That the proceedings of the board of supervisors and county officers which resulted in the issue of said bonds were as follows: On August 23, 1869, the said board called an election of the people of Warren County, to be held on September 23, 1869, for the purpose, as stated in their order and the notice of said election, to determine the question of a county subscription of two hundred thousand dollars to the stock of the Rockford, Rock Island and S't Louis R. R. Co., "including the one hundred thousand dollars previously voted"; that the "one hundred thousand dollars previously voted" was a subscription never made, but "previously voted," by the people of Warren County to the S't Louis, Alton and Rock Island Railroad Company, and the right to have this
59 sum was claimed to have been transferred to the Rockford, Rock Island and S't Louis R. R. Company by virtue of an act of the general assembly of the State of Illinois, passed at the session of 1869. That notices for the election of Sept. 23d, 1869, were not published in the newspapers of said county of Warren until August 27th, 1869, and that some of those posted in the county were not posted for the full period of thirty days, and in one township no notice was posted at all; but that in all townships except the one notices were published for periods varying from twenty to thirty days. That the election was held on September 23, 1869, and at said election those voting for said subscription were seventeen hundred and seventy-five (1,775), and those against subscription were nine hundred and seventy-five (975), and the total vote of the county, as shown by the votes cast at the last general election, was four thousand seven hundred & thirty-one; that said votes, soon after September 23, 1869, were duly canvassed and filed in the clerk's office, and that, on March 16th, 1870, the said board declared that the election had resulted in favor of the subscription, and ordered David Turnbull, their chairman, to subscribe two hundred thousand dollars to the stock of said company.

That on the 18th day of July, 1870, A. C. Harding, a tax-payer
60 and citizen of said county, filed a bill in chancery against the county officers and said company, asking for an injunction to prevent said subscription being made and said bonds from being issued, and obtained the injunction in August, A. D. 1870.

That the bill was filed by said tax-payer, as above stated, in behalf of himself and of all other tax-payers and citizens of said county, and against the said board, its chairman, and clerk, and said company, as defendants, in the circuit court of Warren County, Illinois.

That by said bill said complainant set up the foregoing facts, among other things, and charged that the said county officers had no authority by law to make said subscription and issue said bonds, but threatened to do so, and prayed that they be restrained by a writ of injunction from so doing, and that their proceedings be set aside and declared void.

That a summons and writ of injunction, according to the prayer of the bill, was issued and served upon the defendants in August, 1870. The complainant filing the required bond, said injunction was in full force until January 23, 1871, when, on motion of the said defendants and against the objections of said complainant, it was dissolved.

61 That the complainant thereupon at said term, on the 27th day of January, 1871, prayed an appeal from said order dissolving said injunction, offering proper bond, but the court refused said appeal.

That thereupon said cause went to a final hearing, and said hearing was had at said term, to wit, upon February 2d, 1871, and a decree was entered dismissing said bill.

That from this decree the said complainant prayed and perfected an appeal to the supreme court of the State, and so prosecuted the said appeal that, at the first term thereafter of said supreme court, the cause was heard and the supreme court, after due consideration, afterwards, and upon the day of , A. D. 1873, entered a decree ordering said decree of the circuit court to be reversed, and the cause to be remanded, with directions to said circuit court to enter a decree for the complainant according to the prayer of the bill.

That in accordance with the order of said supreme court, and after the suit in this case was commenced, but before the trial, the decree was, upon the day of , A. D. 1873, entered in the said circuit court of Warren County. That the said case of said Harding was commenced and prosecuted by the said Harding in good faith and without

62 collusion.

The acts of March 4th, of March 25th, and of March 26th, 1869, were pending before the legislature at the same time, and the two former acts were reported by the same committee to the senate at the same time, the latter of the two being amended and a substitute for the former being recommended by the committee, and the recommendation of the committee being concurred in, both were then passed in their new shape.

That it appears by the journals that the law of March 25th was first introduced into the legislature, both this and the bill of March 24th being house bills; that the act of March 25th passed every step of its progress in the house and then went to the senate, and there passed its second reading and was referred to said committee before the act of March 4th overtook it.

That the road of said company is about three hundred miles in length, and was partially built north and south of Warren County, and it was declared by the company that it would go through Warren County before said election was held.

That before the said subscription of said county was made, and its bonds issued, said railroad company had obtained from the towns of Warren County subscriptions to the amount of about one hun-

63 dred and fifty thousand dollars to its stock, in payment of which about the same time the bonds of said towns were issued and paid to said company.

That the act of March 4, 1869, above referred to, is entitled "An act to incorporate the Rockford, Rock Island and S't Louis R. R. Company," and is found in the private laws of 1869, vol. 3, p. 342.

That the act of March 25, 1869, above referred to, is entitled "An act

to authorize certain counties and towns therein named to subscribe stock in railroad companies," and is found in the private laws of 1869, vol. 3, p. 368. The act of March 26, 1869, is found vol. 3, private laws of 1869, p. 365.

Upon the foregoing facts (some of which were objected to by the plaintiff's counsel as incompetent and irrelevant, and were admitted by the court, subject to objection), and which were all the facts in evidence bearing on the merits of the case, the court found for the plaintiff and assessed the damages, the court being of the opinion that the plaintiff was entitled to recover, to which finding and opinion the defendant then and there excepted.

THOMAS DRUMMOND.

(Endorsed:) Filed January 5, A. D. 1875. W'm H. Bradley, clerk.

64 Afterwards, to wit, on the 8th day of January, A. D. 1875, said defendant filed in said clerk's office his bond in appeal in said entitled cause, which said bond is in the words and figures following, to wit:

Appeal-bond.

Know all men by these presents that the County of Warren, in the State of Illinois, as principal, and George F. Harding, as security, are held and firmly bound unto The Portsmouth Savings Bank of the city of Portsmouth, in the State of New Hampshire, in the full and just sum of thirteen thousand dollars, to be paid to the said Portsmouth Savings Bank, their successors, or assigns, attorneys, or agents, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this 8th day of January, in the year of our Lord one thousand eight hundred and seventy-five.

Whereas lately, at a term of the circuit court of the United States for the northern district of Illinois, in a suit depending in said court between The Portsmouth Savings Bank, plaintiff, and the Board of Supervisors of Warren County, Illinois, defendant, a judgment was rendered against the said the County of Warren on January 5th, A. D. 1875, for the sum of six thousand four hundred and ninety-nine and $\frac{47}{100}$ dollars, and

65 the said defendant having obtained writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and citation directed to the said plaintiff, citing and admonishing to be and appear at a Supreme Court of the United States to be holden at Washington, the second Monday of October next: Now the condition of the above obligation is such that if the said defendant shall prosecute its writ of error to effect, and answer all damages and costs if it fails to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE COUNTY OF WARREN,
By ABSALOM VANDEVERE, [SEAL.]
Chairman of the Board of Supervisors of said County,
And W. H. SEXTON, [SEAL.]
The Clerk of Board, in pursuance of the attached resolution.
GEO. F. HARDING. [SEAL.]

Signed, sealed, and delivered in presence of
[SEAL.] F. R. LINCOLN.

1. Resolved, That to perform and carry out our contract with Abner C. Harding, dec'd, Absalom Vandevere, chairman of this board of supervisors, and W'm H. Sexton, clerk of said board, are hereby authorized and directed to make, execute, and sign & seal for this board, and in its name, the bonds deemed by our attorney, George F. Harding, necessary in order to appeal from any judgments which now are or hereafter
66 shall be entered against said board or against Warren County in any suits brought or to be brought to recover the interest or principal of the bonds heretofore issued, as it is claimed, to the Rockford, Rock Island & S't Louis R. R. Co., by the County of Warren.

STATE OF ILLINOIS,
Warren County, ss:

I, W. H. Sexton, clerk of the board of supervisors of said county & State, do hereby certify that the foregoing resolution was duly adopted by said board of supervisors at a special meeting of said board convened on the 4th day of January, A. D. 1875.

Witness my hand and the county seal this 11th day of Jan'y, A. D. 1875.

[SEAL.] W. H. SEXTON,
Clerk of Board of Supervisors.

Approved.

THOMAS DRUMMOND.

(Endorsed:) Filed Jan'y 8, 1875. W'm H. Bradley, cl'k.

67 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for the northern district of Illinois, do hereby certify the foregoing to be a true transcript of the record and proceedings (except the depositions read on the trial), and as provided for by stipulation, had in the cause wherein Portsmouth Savings Bank is the plaintiff and the County of Warren is the defendant, as the same appears from the records of said court now remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Chicago, in said district, this 16th day of October, A. D. 1875, and of our Independence the 100th year.

[SEAL.] W'M H. BRADLEY, *Clk.*

68 UNITED STATES OF AMERICA, *ss:*

To The Portsmouth Savings Bank, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the 2nd Monday of October, A. D. 1875, next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein the County of Warren is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Thomas Drummond, judge of circuit court of the United States for northern district of Illinois, this 8th day of January, A. D. 1875.

THOMAS DRUMMOND.

(Indorsed:) Circuit court of the United States, northern district of Illinois. Warren County, pl'ff in error, vs. The Portsmouth Savings

Bank, def't in error. Citation. Harding, McCoy & Pratt, for pl'ff in error.

69 UNITED STATES OF AMERICA,
Northern District of Illinois:

The President of the United States to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

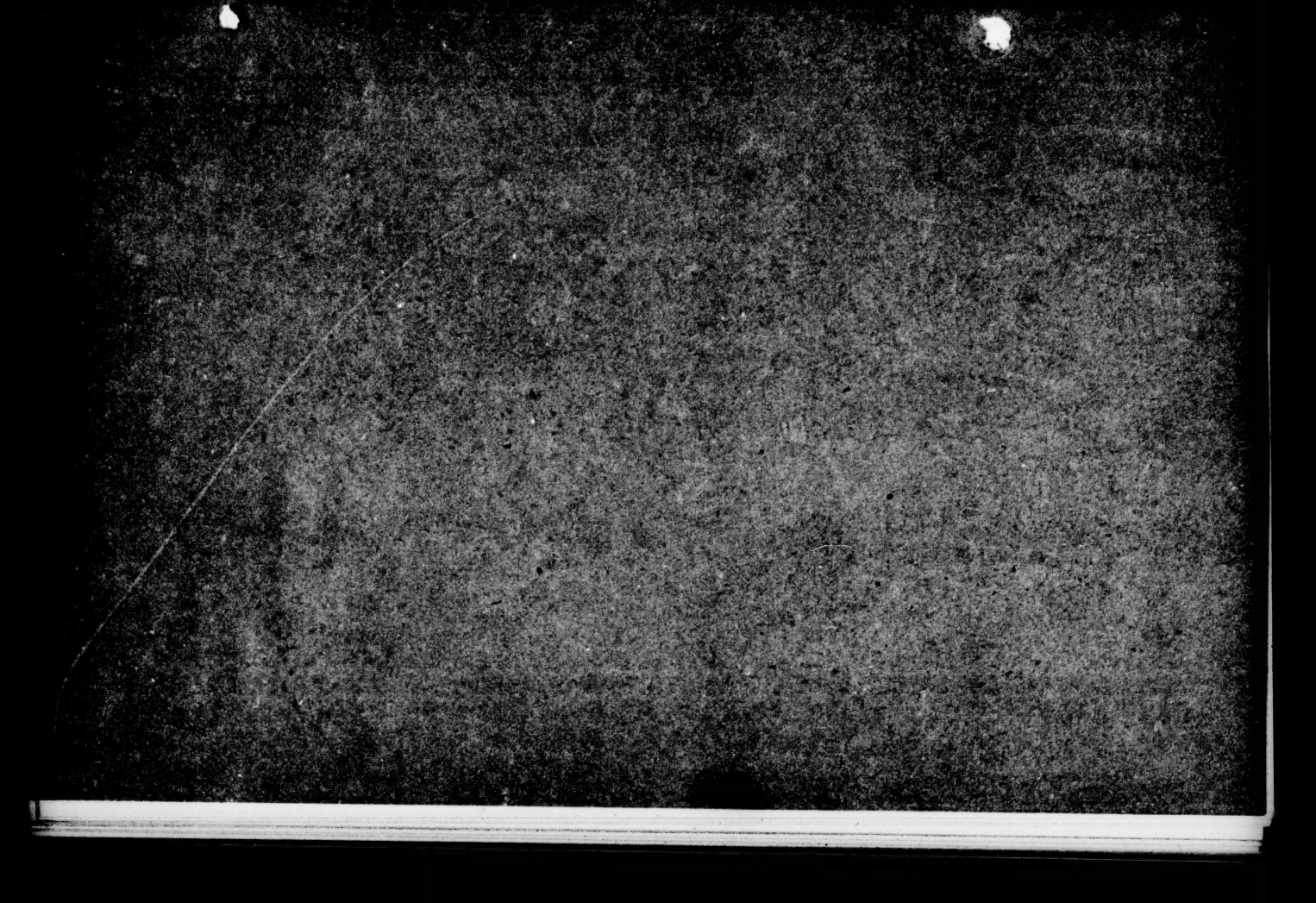
Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said circuit court, between Portsmouth Savings Bank and the County of Warren, in an action of assumpsit, a manifest error hath happened, to the great damage of the said The County of Warren, as by its complaint appears, and it being fit that the error, if any there has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington in the second Monday of October, A. D. 1875, in the Supreme Court to be then and there held, that, the record and proceedings
70 aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 8 day of January, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States the 99th year.

[SEAL.] W'M H. BRADLEY, *Cl'k.*

(Indorsed:) Supreme Court United States. Portsmouth Savings Bank v. The County of Warren. Writ of error.

(Indorsement on cover:) No. 255. The County of Warren, plaintiff in error, vs. The Portsmouth Savings Bank. N. Illinois C. C. U. S. Filed 18th October, 1875.



SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1877.

253 THE COUNTY OF WARREN, *Plaintiff in Error,*
v.
GEORGE O. MARCEY, *Defendant in Error.*

SAME, *Plaintiff in Error,*
254 *v.*
AUGUSTUS T. POST, *Defendant in Error,*

SAME, *Plaintiff in Error.*
255 *v.*
THE PORTSMOUTH SAVINGS BANK, *Defendant in Error.*

Error to the Circuit Court of the United States, for the Northern District of Illinois.

BRIEF AND ARGUMENT

FOR PLAINTIFF IN ERROR,

By GEORGE F. HARDING.

CHICAGO:
CHICAGO LEGAL NEWS CO., PRINTERS & STEREOTYPERS, 151 & 153 Fifth Ave.
1878.

To The Honorable Chief Justice, and Associate Justices, of the Supreme Court of United States:

As these cases involve the same questions, the plaintiff in error submits in each of them the same brief, and respectfully asks that the judgments therein may be reversed.

They were actions of assumpsit brought by defendants, to recover of the plaintiff about $40.000, the amount of certain coupons, for the years 1871, 1872, 1878, of an issue of county bonds, amounting to $200,000, made by the County Clerk of Warren county, Illinois, in the name of the County, on January 25, 1871, and then delivered to the Rockford, Rock Island & St. Louis R. R. Co.

Pleadings.

The suits were brought in July, 1873, and a declaration was then filed in the usual form, giving a copy of a bond (p. 3) in which it is recited that "this bond is issued in conformity" "with the vote of the electors at an election held on September 23, 1869," and that "pursuant to the authority granted by law, and upon the order of the Board of Supervisors," of Jan. 25, 1871, it is signed by the County Clerk. No other statement is given in the bond, or in the declaration as to the authority or law under which the bond was issued.

Pleas.

By stipulation the defense was put in under the general issue, and jury waived and cases submitted to the Court. (p. 37 Record Post.)

The Court made a special finding of the facts, and gave judgment thereon for the plaintiff, to which finding and judgments the defendant then and there excepted. (40–43.)

ASSIGNMENT OF ERROR.

The plaintiff assigns for error that:

The Court erred in entering judgment for the defendants in error upon the facts set out in special finding. (p. 41–2.)

Litigation in State Court.

These bonds were issued pending a bill filed July 18, 1870, by a tax-payer and citizen of the county on behalf of himself and all other taxpayers and citizens of the county to prevent the proposed subscription to the stock of the railroad company and the issue of these bonds, making defendants all the county officers, viz.: The Board of Supervisors, its chairman and clerk, and also the railroad company.

This case was prosecuted with vigor and diligence and in good faith, and without collusion, and resulted in the Supreme Court of Illinois, in a final and permanent injunction according to the prayer of the bill, forbidding the subscription and the issue of the bonds.

The bonds issued pending this suit at a period when the Circuit Court had improperly dissolved the injunction against the subscription and issue of the bonds, upon motion of the defendants and against the objections and opposition of the plaintiff in the bill.

The Plaintiff in error submits the following

POINTS.

I.

These bonds are invalid because they were issued since the adoption of that article of the Constitution of the

State of Illinois of 1870 which forbids that a "County shall ever become subscriber to the capital stock of any railroad corporation;" and they are not within the exception viz: "authorized by a vote of the people."

II.

They are invalid because the county authorities had no authority given by any law to subscribe more than $100,000 to the stock of this company.

III.

They are also invalid because the county authorities had no authority to issue any bonds without being authorized by a vote of the people at an election of which thirty days notice should be given, and in this case they failed to give this notice.

This is *res-adjudicata* by the finding and judgment of the Supreme Court of Illinois in the case of said tax payers of said county, and of this proceeding the purchasers of these bonds which issued pending it, were bound to take notice. The notice of the election actually given is also shown in the special finding, and by comparison with the law is seen to be clearly insufficient and illegal.

POINT FIRST: *As to the effect of the Constitutional provision.*

The article is as follows:

"MUNICIPAL SUBSCRIPTIONS TO RAILROADS OR PRIVATE CORPORATIONS."

"No county, city, township or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of such corporation: *provided, however,* that the adoption of this article shall not be construed

65. 84. 904

as affecting the right of any such municipality to make such subscriptions where the same have been authorized under existing laws by a vote of the people of such municipalities, prior to such adoption." (Rev. Stat. 74, p. 82.)

The county was not a subscriber at all when this constitutional provision was adopted. The prayer of the bill of the tax payers as the court finds (p. 41), was to "prevent said subscription being made." The court also finds that the bill set up that the defendants "the chairman of the Board of Supervisors" and other county officials "had no authority by law to *make said subscriptions* but *threatened to do so*" (p. 42), and prayed that they be restrained by injunction "*from doing so.*"

That this injunction was issued and served in August, 1870 (p. 42), and that the injunction being dissolved on motion of defendant, upon appeal to the Supreme Court, that Court reversed this order, and ordered the Circuit Court to "enter a decree for complainant according to the prayer of the bill," and then finds that "in accordance with the order of the Supreme Court" * * "the decree was entered" in the Circuit Court of the county.

Thus it appears that this litigation proceeded for years upon the assumption that a subscription had not been made, and upon the allegation that it was about to be made and was threatened to be made, that issues were made up and a final hearing had thereon, such that the making of this subscription was restrained by repeated injunctions—to which litigation the chairman of the board and the county officials were all parties defendants with said Railroad Company.

It is therefore submitted, that this action of the parties to such subscription is *prima facie* evidence, if not evidence as an *estoppel en pais*, that no subscription had been made prior to said injunction, to-wit: prior to August, 1870, and hence that it could not have been made prior

to July 2, 1870, the date of the adoption of the article of the constitution of 1870, forbidding the county to subscribe.

It is further submitted, that the mere production of a paper signed by this chairman, purporting to be made in March, 1870, subscribing to the stock of this company, in the name of the county, is not sufficient evidence to rebut this *prima facie* case, under the circumstances.

That the date of such a paper needs to be authenticated in the most full and formal way, because the paper comes from the custody of parties whose interest it is to have the paper *ante* date the constitution.

See Stephens' Digest of Evidence and cases cited, p. 84.

The fact is, then, that no subscription was in fact made; but to hold this may be regarded as unnecessary in order to show that the county was not a subscriber prior to the adoption of the constitution. For it is submitted that the county was not a subscriber before the constitution was adopted for another reason, namely, because the name of the county was not affixed to a subscription to stock, nor directed to be affixed, nor was any order made to subscribe stock, by any one who was authorized by law to make such subscription. Without this authority, the acts of the board of supervisors and of the chairman of that board were merely the acts of strangers.

The Supreme Court of Illinois has found that the law gave to the officials no power to act without at least an election, and that the pretended election of September, 1869, was invalid because no proper notice thereof was given, as required by law. X

As we shall see hereafter, the only law under which this power to subscribe can be justly claimed at all is the act of March 4th, 1869, amending the charter of said railroad company, in which a vote at an election upon notice of thirty days both by publication and by posting the same,

X Hackney vs R R 9 Ill S. R.R. Cases Sec R 90

was required as a condition to the exercise by any county of this power to subscribe stock.

Priv. Laws, Ill., '69, Vol. 3, p. 342.

Hence it is true and it is also *res adjudicata* that the county was not a subscriber prior to the adoption of the Constitution, and hence, too, the county could not become a subscriber since, for the same reason, viz: subscription has never been "authorized by a *vote* of the people under existing laws."

There was no such vote because there was no such notice of the election given as required by the law, and of this the proof is the decree of the Supreme Court of Illinois—a decree of the highest authority, made under circumstances the most binding, viz: in a case where the people of this county were plaintiffs, and the defendants were their officers and also the railroad company in aid of which the bonds were issued.

It is in vain to say the officers of the county so found or so declared. They could not confer authority upon themselves by their own certificate. They could not take authority in spite of this constitutional prohibition which makes their authority dependent, not upon their certificate, but upon the fact.

Now this Article of the Constitution does not permit subscription when the county officers shall certify there was a vote prior to adoption authorizing subscription.

This "apparent power" was destroyed by the repeal of the law permitting subscriptions.

The "special tribunal" had no power, because in this extraordinary and exceptional case the question is, what was the fact, and should be answered by the fact, and the fact alone.

Besides there is this further reason for this construction of this constitutional provision, viz: that if the county officers could take power by their own record, their own certificate, then they may forever continue to

issue bonds, and such construction would nullify and annihilate the constitutional prohibition. It could be defeated by a stroke of the pen—by a false entry of the very officials whose power was thus taken away. We submit that there is a broad distinction between the cases where the constitution permits the county to go on subscribing on certain terms, and this mere saving of a *right* to perfect a contract actually authorized by the people prior to adoption of constitution.

But could the construction claimed for this article, viz: that the officers could after the adoption of this article as before, take the power and make the finding which should have the force due the finding of a tribunal established by the law, still we submit that the issue of the bonds in the cases at bar is invalid for another reason, to wit: because they were issued pending the proceedings instituted by the tax payers and citizens by which the people appealed to the courts from the special tribunals appointed by law to decide whether an election was held, and in which it was determined that the defendants, their officers, had no power to bind them because there was no election, such as the law required.

The facts in regard to this proceeding will be found in the special finding of Judge Drummond (p. 41–2, Record Post), who also finds that the said case was commenced and prosecuted "in good faith and without collusion."

It is submitted, that the people of the county did by this proceeding review and reverse the finding of the Board of Supervisors; that the purchasers of the bonds were bound to take notice of this proceeding; that it may be reasonably presumed that they had actual notice because the records of the Board advised them of this action against the Board; and that the decree of the State Court therein was conclusive that there was no valid election, and that the county officers had no authority to subscribe stock and issue the bonds; and that the sale

of the subject matter in controversy—the sale of the right under litigation "did not vary the rights of the parties who were not to receive any prejudice from the alienation."

As to this and the other questions in this case, we submit the following argument:

INDEX TO ARGUMENT.

I.

Lis pendens, p. 42 to 70.

A. The great authority and necessity of this rule of law, known as the rule or doctrine of *lis pendens*, (p. 42.
B. to 70.) It extends not only to real property, but also to personal property of every description. (p. 44.)
C. The only exception known to the rule of *lis pendens* is in the case of negotiable paper not yet due when suit is brought, and where it is not yet impounded. (p. 45.)
D. The reasons for this exception are found in the interests and necessities of commerce; since to apply the ordinary rule of *lis pendens* to commercial paper would be to forbid the use of it. To require the purchaser to take notice of all suits in regard to it, would be to require inquiry touching many suits, of many forms of action, of many different parties, in many different courts, and also of unknown suits of or against unknown parties, and in unknown courts. So that no time or care could insure to the purchaser safety. (46.)
C. The reasons for this exception do not exist in the case of the paper in suit. It is neither difficult nor expensive to make the inquiry required; for the purchaser need take notice of but one suit involving but one question, in but one court, and of known parties; and could satisfy himself by inquiring of the parties on the spot. To protect himself under

this rule, the purchaser need only go to the one court, where alone the corporation can be sued—the court of its own locality—of its county or district, just as in case of real estate. (47.)

He has only to inquire for a suit for or against the corporation, by its citizens or tax payers. If there be inconvenience or mischief in requiring such inquiry, how small the mischief would be is seen in the fact that the case at bar is the first, in the countless issues of bonds, where the purchaser of bonds could suffer injury by neglect of inquiry—the very first instance of such proceeding in apt time. (48–53–54.)

Better far to endure such exceptional mischief, if it be one, than to altogether deny the protection of the Court in such cases; better this mischief "to prevent a greater mischief" by the placing of whole communities under the heel of the tax-gatherer, at the will of any false agent; better than to acknowledge that the courts can not help even the most vigilant, but must at the beck of the most indifferent and careless purchaser strip the people of their property, wrested from them in spite of the utmost of skill, care, and diligence.

WIDE DISTINCTION.

The decree here is attacked by the paper manufactured after suit brought.

The suitor asking aid of Court to cancel or attack commercial paper which he has made or allowed his agent to make, asks in vain the aid of the Court against the nimble emissary of commerce, if he be not fortunate enough to seize and impound it.

He attacks the paper and fails, because the rule of *lis pendens* which protects the decrees of the Court, is met by another which protects the interests of commerce,—by a rule under which the paper was already protected before the Court attempted to act in the case at bar.

On the contrary, this paper, in form commercial, is made after the Court has asserted jurisdiction to prevent its being made, and is deliberately made to attack and defeat the decree of the Court, and in defiance of that decree. (58)

How did the Court lose its power? The full fledged paper of commerce is left under the protection of commerce from necessity; but paper born after suit brought, paper in form commercial, made against the will of principals by agents without real authority—made pending a suit to prevent its being made; such paper which it was a fraud to make; against such paper, how and when was it that the Court lost its power—the Court, which started at first with full jurisdiction over the parties and the subject matter? (59–60)

NOTICE.

The same rule has always been applied in favor of a co-partnership to defeat the paper put forth by a co-partner, in the name of the co-partnership after its dissolution, viz: special notice to those who have dealt with the firm, and a general notice, by publication or otherwise, to those who have never dealt with the firm. (48–56.)

To cut off liability, says Lord Ellenborough, *Newman* v. *Cole*, 2 Camp., 618, the co-partners are "not bound to drive the co-partners from the place of business," nor "to take any notice of the firm name which their partners might happen to use," nor "to apply to the Lord Chancellor for an injunction." (49.)

This proceeding in the Courts of the tax-payers and citizens, is the oldest and best kind of notice for a "*lis pendens*," says Chancellor Kent, (*Murray* v. *Ballou*, 1 John. Ch. 574), "duly prosecuted and not collusive is notice to the purchaser of any part of the matter in litigation so as to affect and bind him," and "it is impossible to mention any rule of law established upon higher authority or with a more uniform sanction." (52–3.)

The burthen is upon those who claim such a case as this, paper manufactured to defeat the decree of Court, to be within the exception to the general rule protecting the decree of Courts, to show it by reason and authority —to show the principles and cases upon which such exception rests. (62)

Are the Courts powerless? Our opponents must assert this, or else admit this defense to be good. (63)

If not, let them show how else the people can protect themselves. (64)

The people might have voted down the issue of these bonds had they had an opportunity, viz: an election, of which they had notice.

But even this meritorious defense is valuless unless the doctrine of *lis pendens* is held to make it good. (62–7)

In *Knox County* v. *Aspinwall*, 21 How., 545, this Court expressly reserve this question. The language is, "We do not say that the decision of the board would be conclusive, in a direct proceeding to inquire into the facts, previously to the execution of the power, and before the rights and interests of third parties had attached."

We submit, that the people of this county had a vested and irrevocable right to protection, given by the decree of the State Court in this proceeding.

III.

WANT OF POWER.

These bonds are invalid for excess as to amount. They are an issue of $200,000 upon a subscription of $200,000. The law in force permitted but $100,000.

1. The law of March 4, 1869, fixes the amount which can be subscribed by this county to this company at not exceeding $100,000. (78)

The title of the Act and Section 6 are all that is material, and are as follows:

House Bill 628: or, The Act of March 4, '69:-

An act to amend an act, entitled "An act to incorporate the Rockford, Rock Island & St. Louis Railroad Company," approved March 4, 1869.

SEC. 6. Any incorporated city, or any town, village or county, through which said railroad may pass, or which may be situated on or near the line of said railroad, may subscribe to the capital stock of said company, any sum not exceeding one hundred thousand dollars, and may issue bonds in denominations of not less than one hundred dollars, with coupons for the interest, properly attached, bearing interest at any rate not exceeding ten per centum per annum, payable annually, which bonds may run any period not exceeding thirty years, to be determined on by the county court, board of supervisors, city council, town trustees or other, the legal and proper authorities authorized to issue said bonds: Provided, that before said stock shall be subscribed, an election shall be held in conformity to the laws in regard to ordinary State, city, county or town elections, thirty days' notice first having been given, by publication in at least one newspaper in the county, and six public notices, printed or written, having been posted in six of the most public places therein, during the time above named, and returns to be made in the usual way; at which election a majority of the legal voters voting on the question, shall have voted in favor of said subscription.

Private Laws of 1869; Vol. 3, p. 342.

2. The power is claimed under the law of March 25, 1869, which declares the counties therein named, including Warren, and their towns, may take any amount of stock they see fit in any railroad company.

All that is material of this Act will be found in Section 1 and 10 of the Act, which read as follows:

SEC. 1. Be it enacted by the people of the State of Illinois, represented in the General Assembly, That the

counties of Rock Island, Mercer, Warren, McDonough, Schuyler, Cass, Scott and Green, and the several towns in such of said counties as have adopted township organization, be, and they and each of them are hereby authorized and empowerd to purchase or subscribe for shares of the capital stock in any railroad company already organized or hereafter to be organized, which passes in whole or in part through the said counties or towns, or any or either of them, to such an amount as any of the said counties and towns, or either of them, shall determine and deem best and proper.

SEC. 10. No subscription to stock shall be made by any of the counties or towns herein mentioned, under the provisions of this act, unless the same is submitted to a vote of the people of such county or town, as the case may be, and unless the same shall receive a majority of the votes cast upon such question at such election. Such question shall be submitted in such manner as the county authorities may determine as to the county, or as the town auditors may determine as to towns.

The plaintiff in error denies that this law, properly construed, gives to this Railroad Company any power to accept a stock subscription from this county. (79)

1st. Because the laws of March 4th, 1869, and of March 25th, 1869, were passed at the same session of the Legislature, and are to be considered as different and harmonious sections of one and the same statute or code. (80–1)

The law of March 4th, 1869, amending the Charter of the Railroad Company, regulates its power to contract its stock with the counties along its line.

The law of March 25th, 1869, must be construed as regulating the power of other companies to contract their stock with the counties therein named. (87–93–96–97–99–111)

A. The counties named in this Act of March 25th, are the counties through which the road of this company

passes; and that act leaves nothing for the Act of March 4th to act upon, if it is not applied to them and their contracts with the company therein named (115)

B. The Act of March 25th, if it touched the contracts of this company, repeals the wholesome restrictions which the Legislature put by the Act of March 4th, and again, by that of March 26th, and other acts of same session, upon this very Railroad Company by name, as to its power to contract with municipalities therein named. (118)

C. The Court finds that, the Act of March 25th, passed every stage of its progress through the House and Senate of the Legislature, save the very last, which was only the last reading in the Senate, before and not after, the law of March 4th: Hence there is no ground whatever, for claiming that the Act of March 25th: repealed by implication that of March 4th. (80–87–88–89).

Both were House bills.

The law of March 4th, overtook the law of March 25th, after the second reading of the latter act in the Senate. Both were refered to the same Committee, and both were reported back at the same time; the Act of March 25th, being amended by the Committee, and for the Act of March 4th, a substitute being recommended, by the same Committee; and the recommendations of the Committee being concurred in, both were then passed in their new shape. (Finding. 34)"

The passage of the Act of March 4th, before its elder Act of March 25th, was purely accidental. Of this the Court needs no proof, for, in the language of Judge Roane in *Kennedy* v. *Beverly* 2 Hen. & Munf'd, 343; "although, in fact, the latter Act was passed a few days before the former, this Court will judicially take notice that that may have been merely accidental." (88)

D. The Act of March 26th, passed on the very next day after the Act of March 25th, shows that the latter was not meant to apply to contracts of this Railroad Company.

This Act will be found in Priv. Laws, 69, vol. 3, p. 365.

The Legislature, by the Act of March 26th, say to the County Courts in each of the counties named in the Act of March 25th, which are not "under township organization," (the Court will judicially take notice that one half of said counties, at least, are not under township organization), and also "to the corporate authorities" of all the towns in counties that have township organization (all the towns of the Act of March 25th, 1869), that if this Railroad "shall run through any" part of said county or counties, that they may subscribe to its stock "not to exceed $3,000 per mile for the distance said Railroad traverses said county, and not exceeding $10,000 for every 1,000 inhabitants;" and shall take no such subscription "until authorized by a vote of the people after at least thirty day's notice of such election shall be given in the manner now provided by law."

Yet we are to suppose, on March 25th, the Legislature told the same corporations they could take what stock they chose in the same Railroad Company.

E. Two Acts of same session of same Legislature as to Scott County, a county named in the Act of March 25th, (Vol. 3 Priv. Laws 1869, pp. 366–7) one in force Jan'y 23d, 1869, and one, March 25th, 1869 show that this law in question, and also of same date, viz: March 25th, 1869, was not meant for the contracts of the Railroad Company. (134–5)

The act of Jan'y 23d, 1869, specially authorizes the county of Scott to subscribe to the stock of this company, not exceeding $100,000, and the Act of March 25th is a law, specially providing for this same Scott County, and no other county, and professes to amend the Act of Jan'y

23d, and declares the election held in Scott county valid, and makes it the duty of the County Court to subscribe $50,000 stock to this same Railroad Company.

Is it possible that on the same day the same Legislature, by the Act of March 25th, under which so much is claimed, (by the terms of which, power is claimed for Warren County in this case, to subscribe stock in this Railroad Co.) meant to say to Scott county named just as Warren county is named therein—and not otherwise—to Scott county named in both laws of that date, to take what stock they pleased in this company? That after saying not exceeding $100,000, as they said by the Act of Jan'y 23d, and no more than $50,000 as they said by the Act of March 25th, in which they name not only this very Railroad Company, but also this very Scott county: is it possible that the same Legislature, on the same day, by another Act, viz: by this very same Act of March 25th, under which these bonds are justified, say to the same county, "Take any amount of stock in this Railroad Company you please, and after just such an election as you please?"

This absurdity is imputed to the Legislature by a construction of this law of March 25th, so as to include this Rail Road Co. (134–5)

(2) This Legislature established a wholesome policy of restriction and constraint, viz: limiting the amount, and fixing the conditions of subscription and election, touching the power given this R. R. Co. to contract its stock to the municipalities along its line, in every Act in which it is named—in four laws of the same session.

This, too, is the long cherished policy of the State, as shown by the General Rail Road law of 1849. Is there not, then, a reasonable presumption, that if the Legislature were seized with this sudden "trick of the mad," to confer this dangerous power without limit, as to amount,

and without restriction, as to election, as our opponents claim they did by the Act of March 25th, is there not a "reasonable presumption," in the language of Lord Eldon (Ex-parte Burgess; 2 Glynn & Jameson, 199), that they "would have said so by a clear and distinct enactment instead of such vague and general words?"

After carefully tieing up the hands of this company in four acts pending at the same time before them, in conformity and pursuance of a long cherished legislative policy of the State, it is imputing extraordinary indifference and carelessness to this Legislature, to so construe this law as to impute to them the intention of throwing off every wholesome restraint, of nullifying all the other acts and safeguards; and this too, in an act in which this Railroad Company is not even named. To "doubt" this, is to decide against the power to issue these bonds. (123–7, 130–1, 136–7, 190–191.

The true rule is to give to the act of March 25 such meaning as remains for it after giviug full force to all the acts of the same session. Hence, it should be read as if the Railroad Company in question was excepted from the companies described by the general words "any railroad company already organized, or hereafter to be organized, which passes in whole or in part through the said counties or towns, or any or either of them." The legislature had sufficiently provided for this company by the many laws of that session in which it is named.

(3) The doctrine of cumulative power or licenses under which it is claimed this act of March 25th may be given the construction claimed, is simply another way of saying that the other acts are repealed by implication. The contrary is the true rule, namely: that "every presumption is to be made against the company and in favor of private property,"—every intendment not entirely unfounded. 52, Pa. 516, (148.)

Besides, see the slender ground of difference in these laws which are pointed out, viz.: that the act of March 4 applies to counties near which, as well as through which, the railroad passes, while the act of March 25, it is said, applies only to counties and towns through which it passes.

Even this distinction does not exist as to the law of March 26, which is still more stringent in its restrictions than that of March 4, showing that the legislature had not in the meantime adopted a new policy of unlimited license, as our opponents claim.

(4) Negative words as to the matter in question, viz., the amount of stock to be subscribed, are entitled to greater force than general and affirmative words The language of the act of March 4 is negative, viz.: "not exceeding $100,000." The language of the act of March 25 is loose and affirmative only, viz.: such an amount as they "shall determine and deem best and proper." (116.)

(5) The law of March 4th is a special law just as the others, in which this company is named, and which all purport to amend its charter, and are specially meant for this company, and for this company only. (111-114.)

That of March 25, under which this power is claimed, contains only loose and general language, and should not enable this company, in which it is not named, to contract its stock in exchange for municipal bonds, contrary to its own charter, as amended by these special acts. The powers claimed would have been refused to this company had the alleged grant been clothed in appropriate language, and the company named. (96-110.)

(6) Laws should be so construed so as to suppress the mischief of debt-making, at which the provisions of the Constitution of 1870 and the several amend-

ments to this charter were aimed: (120-7). And also to suppress the mischiefs of unlimited subscriptions, of double subscriptions, and of unrestrained elections, at which these laws are severally aimed. (88-6.)

(7) The powers of municipal corporations to create debts must be strictly construed; the power to impose a tax must be expressed in language clear beyond all reasonable doubt. (130-3).

III.

The act of March 25 is unconstitutional, and confers no power for that reason. (153.)

It violates section 23 of article 3 of the constitution of the State (of 1848), which provides that "no private or local act shall embrace more than one subject, and that shall be expressed in its title."

It is local, for it is confined to eight counties of the state, and to railroad companies whose line may pass through them.

This provision of the constitution is mandatory. *People* vs. *Miller*, 32 Ill., 183. (154.)

A.

This act embraces more than one subject. It embraces many corporations, viz.: eight counties and their towns, and all railroad companies organized or to be organized, whose roads run through any of them.

The word subject can only mean in a local law, a single corporation and its powers; no wider construction has yet been given that word. 25 Ill., 182, Schuyler Co. vs. People. (156.)

Railroad subscription is not a subject in the sense of this constitutional provision, which was aimed at; "log rolling," "omnibus" legislation. (158–9.)

B.

But a more decisive reason is, viz.: the act of March 25 infringes this coustitutional provision because the subject is not "*expressed*" in the title. (164.)

The true subject is the matter to which the statute relates; that is the corporations whose power it regulates. This act tells us nothing as to this: "An act to enable certain counties therein named to subscribe stock in railroad companies."

Not enough that the title refers to the body of the bill to state the subject. The object of the provision was that the title should show whose interests the bill concerned, and it must speak for itself. (166.)

The title should show to what part of the State the bill applies. (167–8, 171–81).

Who, legislator or citizen, could tell that it applied to his county?

He must read the body of the act to learn what the constitution declares the title shall express. This is a real mischief; for no such law as to this company could have been passed if it had not been concealed under a blind title.

Additional Statement of Facts.

By stipulation made since the above statement of facts was printed, it is agreed that the defendant may put in any matter of defense it may have under the general issue with like effect as if plead specially; and all special pleas are withdrawn except the sixth plea, to which a demurrer has been sustained.

It is also stipulated that a deposition of Merrill, taken in another case, and now on file in this case, shall be regarded as if regularly taken herein.

By this testimony of Merrill it appears, among other things, that the towns of Warren county had issued to this company $123,000 in bonds, in payment of their stock subscriptions, and that these issues were made before the issue of the county bonds. It also appears that the length of the road in Warren county is 33 miles. It also appears that the railroad company did not, on January 23d, demand the bonds of the county clerk, but that said Bone issued his call for a meeting of the Board without any demand whatever from the railroad company.

The oral testimony of John W. Matthews was also taken, and he testifies that there were three newspapers in Warren county published in 1869, that they were published on Friday of each week, and that the call for the special meeting of the Board, made on Monday, January 23, '69, for the meeting of Wednesday, January 25, '69, could not have been published in said newspapers before said meeting.

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ARGUMENT.

I.

LIS PENDENS.

The decree of the Supreme Court of the State of Illinois in the case of Abner C. Harding against the Rockford, Rock Island & St. Louis R. R. Co. et al., is a complete defense to these actions; for the coupons sued upon were issued pending that suit, which was brought to prevent their issue, and they fall with the orders of the Board, the election, and subscription set aside by said decree.

The Authority and Necessity of the Rule.

This proposition rests upon the established and fundamental doctrine of all courts, upon which the successful administration of justice depends, viz: "that a lis pendens, duly prosecuted and not collusive, is notice to the purchaser of any part of the matter in litigation so as to affect and bind him." "It would be impossible, as I apprhhend, to mention any rule of law which has been established upon higher authority or with a more uniform sanction." Chan. Kent in

Murray *v.* Ballou, 1 John. Ch., 576; and see cases cited.

"There is," says Chancellor Kent, "no principle better established, nor one founded on more indispensable necessity, than that the purchaser of the subject matter in controversy, *pendente lite*, does not vary the rights of the parties in that suit, who were not to receive any prejudice from the alienation."

Murray *v.* Lylburn, 2 Johns. Ch., 448.

"It is a rule," said Lord Hardwicke, Worseley *v.* Scarborough, 3 Atk., 392, "to prevent a greater mischief that would arise by people's purchasing a right under litigation."

"General convenience," said Sir Wm. Grant, in Bishop of Winchester *v.* Paine, 11 Ves., Jr., 200, "requires its adoption; otherwise suits would be terminable at the pleasure of one party."

"The doctrine, as to the effect of lis pendens on the title of the alienee, is founded not on any principle of a court of equity in regard to notice, but on the ground that it is necessary to the administration of justice, that the decision of the court should be binding, not only on the litigant parties, but on those who derive titles from them pendente lite, whether with notice of the suit or not."

2 White & Tudor's Leading Cases, p. 64.

This rule was declared over two centuries ago, and by the highest authority; it was one of the ordinances of Lord Bacon, laid down "for the better and more regular administration of justice in the Court of Chancery."

Park *v.* Jackson, 11 Wend., 453.

EXTENDS TO PERSONAL PROPERTY OF EVERY DESCRIPTION.

It applies to personal as well as real property and to personal property of every description.

McCutcheon *v.* Miller, 31 Miss., 83.

To a mortgage:

Bishop of Winchster *v.* Paine, 11 Ves., Jr., 200.

To a judgment;

Same *v.* Beaver 3 Ves., Jr., 314.

To paper:

Kellogg, et al. *v.* Fancher et al., 23 Wis., 1.

To furniture:

Scudder *v.* Van Amburgh, Edw., ch. 30.

To goods:

Haddens *v.* Spaders, 20 John, 573.

To slaves:

McRary *v* . Fries, 4 Jones Eq., N. C., 234.

To slaves:

Fletcher *v.* Ferrell, 9 Dana Ky., 377.

To stock:

Leitch *v.* Wells, 48 Barb., 650.

To choses in action and securities:

Murray *v.* Lylburn, 2 John. Ch., 443.

"If the trustee," says Chan. Kent, in the case last cited, "pending suit, changed land into personal property, * * I see no good reason why the *cestui que trusts* should not affirm the sale and take the security; *and whoever afterwards purchased it, it was chargeable* with notice of the suit. * If Winter (trustee) had held a number of mortgages and other securities in trust, when suit was commenced, it cannot be pretended that he might safely defeat the object

of the suit, and elude the justice of the court by selling these securities. * * The object of that suit was to take the whole subject of that trust out of his hands, together with all the papers and securities relating thereto. * * The ground, however, on which I place the right of the *cestui que trusts* in this case to pursue the bond and mortgage in the hands of the assignee of Winter, *is constructive notice to all the world* arising from the bill and supplementary bill filed in 1809 for a breach of trust." 443, Id.

ONLY EXCEPTION NEGOTIABLE PAPER NOT YET DUE WHEN SUIT IS BROUGHT, AND NOT IMPOUNDED.

The only recognized exeception to this rule is from necessity and the interests of commerce, viz., the case of negotiable paper existing and not yet due when the lis is brought. (Diamond *v.* Lawrence Co., 37 Penn., 353.) For illustrations of this, see the following cases, which are fair samples of the cases on the subject, and in each case the exception is made in favor of commercial paper, existing and in the hands of the party before suit brought, and afterwards sold and transferred by him to an innocent third party, whose right to it was attempted to be affected by reason of suits in *attachment.*

Miner *v.* West, 38 Geo., 23.
Kieffer *v.* Ehler, 18 Pa., 391.

So where attacked by creditor's bill:

Winston *v.* Westfeldt, 22 Ala. 761.
Stone *v.* Elliot, 10 Ohio, 260.

Not a case in the books can be found, in which this exception was sustained, where the paper did not exist at the time when the suit was brought, and where the suit

was brought, as in this case, to prevent it coming into existence.

NOW THIS EXCEPTION TO A RULE SO ESSENTIAL TO JUSTICE SHOULD NOT BE EXTENDED.

This rule that protects the decrees of courts stands upon a great public policy, which forbids that it should be frittered away.

In the case of *Gaskell* v. *Durden*, (2 *Ball & Beatty*, 167), the Lord Chancellor of Ireland declared the rule and its importance, and the danger of frittering it away by exceptions, in the following clear and emphatical language: "The rule of the court undoubtedly is, that any interest acquired *in the subject matter of a suit*, pending the suit, is so far considered a nullity that it cannot avail against the plaintiff's title; and if this rule were not attended to there would be no end to any suit, *the justice of this court would be evaded, and great hardship and inconvenience to the suitor necessarily introduced.* It is extremely difficult to draw any line, and VERY DANGEROUS TO ALLOW OF THE RULE BEING FRITTERED AWAY BY EXCEPTIONS."

REASONS GIVEN FOR THE EXCEPTION.

The reasons given for the exception stop—and the exception may well stop also—at paper born after suit brought, at paper made by an agent pending a suit by his principal to prevent its being made.

The suits against the full-fledged paper may be as numerous not only as the parties, but almost as the forms of action which the law supplies; among them, garnishments, attachments, creditor's bills, bills for the allow-

ance of set-offs against insolvent holders, and others, through the whole diapason, multiplied by the parties, and scattered through space. These may affect the usefulness of commercial paper.

The chief reasons given for this exception are those urged in the case in 18 Pa., viz.: that the use of paper for purposes of commerce would be destroyed if it could be affected by the equities of suits pending against the parties; because it would then be liable to be affected by so many suits—not only those against the original parties, but against each indorser, so that the party buying the payer could not buy safely. For he could not buy until he had found that no such suits were pending, and hence must for safety look to as many courts as there are courts where the parties could have been sued — parties whose residences are unknown; parties who may themselves be unknown, or not found when known. This would introduce an element of uncertainty that no care could altogether eliminate; and the time occupied by such investigations would almost forbid commerce, or the sale of such paper.

THESE REASONS DO NOT EXIST IN THIS AND LIKE CASES.

Now, these reasons are entirely wanting in the cases to which the rule we urge would alone be applicable, and hence, those cases being without the reasons of the exception, on that ground alone should be held without the exception.

But the suit, the lis, of which we ask that the purchaser shall take notice, in its nature is confined to the

question — the single question — of the power of the agent; it must be against the agent; it must be by the principal; it must embrace the contracting party to whom the paper is to be issued. It is thus limited in its character, and in its parties; and from the very character of the parties — the principals who are driven to use it — it is equally fixed in its location, by the *locus in quo* of the corporation. Indeed the diligence of the purchaser—the requirement of the rule—might be satisfied when he investigated that question by inquiry of the parties and on the spot.

It is, in short neither difficult nor expensive to ask the purchaser to take this trouble; while if he does not, the principal, in spite of every prudence and care and effort under the other rule, is handed over, stripped and defenseless, to the tender mercies of corupt agents.

The rule we ask, only requires of the purchaser who deals with a pretended agent to be sure of his power — to take care lest it has been taken away, or the absence of it declared to the public by the principal.

Same Principles Exempt Co-partner giving Notice of Dissolution.

It rests upon the same principles by which notice can be given to the public in the case of a co-partnership to put an end to the power of the co-partner to make co-partnership paper; it is enough in such case to give notice to those who have dealt with the firm, and then a published notice of dissolution will serve to advise the public who have never dealt with the firm.

This notorious litigation, of which a thousand notices were given, was enough to advise the public that the power of the county clerk to issue county bonds was at an end.

As it is not necessary to drive out the copartner from the place of business, to get a receiver appointed; so in this case it was not necessary, as it was not possible, to oust the Board of Supervisors, to oust the county clerk of his office, where he had the right to continue in the performance of his usual duties. The people could do no more than what they did, viz.: file and prosecute successfully a bill to forbid the proposed issue, and, if you please, see that the world had ample notice of this litigation. Quo warranto could not be sustained; impeachment could not be sustained; the only remedy was the direct proceeding by the cestui que trusts, the people, suing by one of their number for the benefit of all, against their trustees, the officers and the railroad company, which was about to deal with these officers.

"It is enough," says Tudor in L. C., 357, speaking of terminating the liability of partnerships, "to give notice in the Gazette as to all who have never traded with the firm; and to send written notice to all who have so dealt." "After that, it was the duty," says Ld. Ellenborough, in Newman *v.* Coles, 2 Camp., 618, "of persons taking securities in the name of Thomas Coles & Sons, to inquire who were designated by the firm. The plaintiff might not know of the dissolution; but he had the means of knowing; and the partners who retired could not remain liable for his ignorance. I think they were

not bound to apply to the Lord Chancellor for an injunction, or to take any notice of the firm name which their partners might happen to use."

This was said in a strong case, where the partners remaining in the firm continued to use, and claimed the right to use, the old firm name in the same place of business; and this language of Lord Ellenborough was his answer to a suit of a third person against the retiring partner, upon paper made in the firm name, after such notice was published, by the partners continuing in business.

Acknowledged Rule of Greater Requirements of Notice by Purchaser of Paper made by Corporations, than of Paper by Co-partnerships.

It is the business of a co-partnership to issue paper, but not that of a municipal corporation; and it may well be doubted whether the notice, sufficient to put an end to the power of the agent in the one case to ruin his partner, ought not to be ample in the case of an officer of a municipal corporation making the like attempt. The established rule is to require greater diligence and inquiry in the case of one dealing with even a joint-stock corporation than with a co-partnership.

The language of Jervis, C. J., in Royal British Bank *v.* Turquand, 6 Ellis & B., 327, shows this:

"We may now take it for granted that the dealings with these companies *are not like dealings with other partnerships*, and that the parties dealing with them *are bound to read the statute and the deed of settlement.*"

Extraordinary Inconsistency and Harsh Result of Holding this Notice by Suit Insufficient.

Now, what an extraordinary finale this—the American Federal Supreme Court adopt and act upon this principle—or the other half of it, viz.: that permission to act on certain conditions is apparent authority, and sufficient to authorize the inference that the conditions were performed which gave the agent the right to make the document, if he only take care to have the document so state; but the court now go further and further, until, at last, they fix the poor citizens of backwoods municipal corporations with requirements of such diligence, on the plea of the interests of commerce, that they cannot be redeemed under the principles that protect commom partnerships the world round! We trust this court will see no such dilemma, but plant their feet on the strong and reasonable ground of common sense applicable to the case of tax-payers in this State. They have less control of the appointment of agents, less power every way, and should have less duty and responsibility required of them by their courts. In this case, when they elected the county clerk he had no power to make county bonds; that power, by the exercise of which third parties have been deceived, was conferred afterwards by the legislature; he was never selected or appointed their agent for the purpose of making county bonds; and surely they can redeem themselves from the acts, or the consequences of the acts of agents imposed by others upon them, by notice, and acts of that class which have always been held sufficient in the case of partnerships to terminate the liability of the principal!

It is true that, as a rule, the people must lose by the shortcomings of their own agents, and not third parties deceived by them or by their action.

But is it not extraordinary that the result of a doctrine established touching corporations, reqniring more from those who deal with them, than from those who deal with co-partnerships, should be to deny to the people what the co-partner confessedly has, to wit, the power to terminate his liability for the acts of his apparent agents by proper notice to *those who have dealt with them* and by a general notice to the public?

Does any doctrine obtain which results in requiring the co-partner, in order to stop responsibility for further issues of firm paper, or of paper made by an agent, with special powers spread of record, to notify every possible purchaser of it that he will not be bound?

That, it will be seen, is exactly what is the result for a corporation: actual notice, not to those who have dealt with them, but to all possible purchasers!

This notice given by this suit is the highest and best form of notice; it is the highest, the fullest, the oldest known; it is emphasized by a continual application to the courts, where it is nothing, unless it be energetically prosecuted to a final decree declaring the truth of it. It was and must be, ex vi termini, a complete and effectual notice to all the parties in interest who must be made defendants, at the very point of time in question, when the relation with the agent is declared dissolved —when the power is withdrawn or denied. After such

a notice to all who had any interest—to all to whom the matter was or could be of interest—to all who had dealt, or were about to deal, with the county agents, the principals were only bound to see that by no act of theirs any change occurred, or further action by their pretended agents was authorized. Is it supposable that this course, which would be ample to protect the principal in the case of a partnership or other agency, is not enough in the case where he does not appoint the agent, where he may have voted against him, where he never authorized him, or meant to authorize him to issue paper? That where this authority is all given by others against his will, and against his protest, and in spite of his appeal to the courts—that then all this shall be vain?

This must strike the mind as a harsh doctrine—a result never intended—and is a reason why this exception must stop short of these bonds.

Perfectly Easy for Purchaser of Paper to Protect Himself.

Practically there is no difficulty in the application of the doctrine we advocate; for it obtains everywhere as to real estate, everywhere as to personal estate, everywhere even as to acknowledged commercial paper, where such paper is impounded, where proper steps are taken in apt time and manner to seize it.

No reason exists in the interests of commerce, for they are not involved, such a state of case as this having never occurred before in the history of paper. Inquiry for such a suit is not an inquiry which could not be satisfied, but

which could be satisfied, and easily satisfied in every case. The suit, to be inquired for, is not hard to find; it is only to go to the court where the corporation can alone be sued—its own locality. It is a suit only against the corporation, and that, as a rule, is confined by law to its county. It is by the citizens and tax-payers, and they, as a rule, belong to the same locality, and certainly cannot sue the corporation elsewhere. In this particular it is precisely the same inquiry as in the case of real estate, and attended by no greater difficulty. If possible that suits should be brought elsewhere, how rarely this is or could be done! Nothing is required *then*, but inquiry of the parties in interest, inquiry for a fact in most cases notorious, naturally known to all who are interested, and in that sense notorious, so many being interested. Besides, as in the case of real estate, it would be easy to say that a suit which could not be readily found, which is concealed, or seeking no injunction, should be disregarded; and to say this is simply to say, in the language of the fundamental doctrine of lis pendens itself, "the suit must be prosecuted in good faith, and must not be collusive." The reasonableness of the rule and its justice, in its application to such cases, may as well be tested by the circumstances of this as by any other case.

The business of the country, by the telegraph and railway, is conducted as if in the same common hall, in one vast chamber of commerce.

In ten minutes Post, or Shores, or Marcy, could have, at the wire, sent a dispatch, and within two hours received an answer which would have forbid the purchase.

Let them ask the officials of Warren county, *e. g.*, the clerk of the circuit court, "is the validity of the bonds being questioned in your court?" Let them ask any intelligent man of the State, and within twenty-four hours the news of the litigation of the tax-payers would have been detailed in their offices in New York and Boston. In any like case of a municipal corporation the inquiry would be for a notorious fact, and in any case there is an office of the corporation where inquiry could be made and satisfied.

Granting that here may be possible mischiefs, is it not better, in the language of Lord Hardwicke, to stand by the solid rule of *lis pendens*, which was established "to prevent a greater mischief that would arise by people's purchasing a right under litigation."

It would be easy to require proof on this point, of the party selling paper open to such impeachment. This inconvenience, if it be one, is it not far better to endure than to deny protection in so many cases—better than to set on foot such gigantic evils, placing whole communities under the heel of the tax-gatherer, at the will of any false agent?

Authority for Applying the Rule because of the Notoriety of the Proceeding.

In Diamond *v.* Lawrence County, 37 Pa. St. R., 357, the same extraordinary notoriety attended the suit which was there held to be notice, and this was thought by the court an important circumstance in determining whether the rule of *lis pendens* fixed the holders of the bonds with

notice. The court, Woodward, J., delivering the opinion, says: "But, considering the peculiarities of this case, and especially the extrordinary notoriety which attended the equity suit against the railroad company, we think the rule is applicable here without limitation. And, according to the rule, the suit was notice to all the world of all the facts alleged in the pleadings, so that this plaintiff stands in no better situation for enforcing the bond against the county, than the company themselves will stand!"

The *lis pendens* there was a bill filed after the county bonds were out—the people had permitted them to issue—but the court still held the doctrine applicable, refusing to treat as commercial paper such temporary and extraordinary securities as it described these county bonds, issued to R. R. companies for stock; and then used the following just language which is worthy of being quoted: "But, it is said, the rights of innocent purchasers cannot be protected unless these distinctions be disregarded. I reply, the rights of tax-payers cannot be protected if they are. No man can go over the history of these bonds and fail to see that there are two parties involved, both of whom are worthy of the regards of the judicial eye. On the one hand there are the purchasers, who have invested their money generally at a large discount, but on the faith that the people whose representatives have issued the bond will see to its redemption; and on the other, there are the people, whose representatives have hurried them thoughtlessly into oppressive indebtedness without an equivalent."

These are the remarks of a court sustaining the doctrine, in a case where the people first permitted the bonds to issue, and then attacked them by the proceeding, which is sustained as a lis pendens, and was held a good defense to a suit upon the bonds by bona fide purchasers.

It needs no comment to show how much stronger is the argument in the case at bar, where the people never permitted their issue, and ask that the decree in this suit, in which they opposed their issue, should be held a lis pendens.

Like a Proceeding in Bankruptcy this touches the "General Circumstances" of the Party issuing the Paper.

A direct proceeding, such as this, touching the general power of the agent to act, is, like the case of a proceeding in bankruptcy, of which it is acknowledged even a purchaser of commercial paper may be compelled to take notice. In Kieffer *v.* Ehler, 18 Pa. St. R., 391, in the course of an opinion holding the title of the holder of a promissory note good against an attachment where it was bought before maturity for a valuable consideration and "without actual notice of any adverse claim or of such suspicious circumstances as should lead to inquiry," the court say: "*In a case of bankruptcy, notice may be implied; because that refers to the general circumstances of a previous holder, into which a purchaser is expected to inquire, and not to a special fact, like an attachment.*"

Other Distinctions of this Case from those where an Exception has been Allowed.

It is idle to attempt to shelter the contrary doctrine

under the pretense that it is the same with that which makes acknowledged commercial paper existing when the suit is brought an exception, and the only exception, to the doctrine of lis pendens.

How can you identify with that wholesome and necessary exception this doctrine by which the decree of a court is to be defeated after the court has obtained jurisdiction of the parties and the subject matter; defeated by the act of the defendant; defeated by the manufacture of illegal paper in form only commercial; defeated by making the very paper which the suit is brought in the name of his principal, the complainant, to prevent? Upon that exception, over the paper protected by it stands the protection of commercial dealing, the interests of commerce, of which that paper is an essential part—the interests of commerce asserted and existing before the courts have asserted their powers! And the power of the court is by that exception defeated only in case it is unable to get possession, to get jurisdiction of the subject matter—in short, to impound the paper. If the party asking the aid of the court against the nimble emissary of commerce is not quick and active and fortunate enough to seize it, the court never gets power over it. There the court attacks the paper, and fails because, not securing it, it is met by another principle and rule under which the paper was already protected before the court attempted to act.

Here, on the contrary, the paper is made to defeat and attack the decree of the court, and in defiance of it!

The former is the case of the common paper of com-

merce; the latter is necessarily paper of a limited class —that made by agents—that of corporations—and chiefly of municipal corporations; and the question only arises where a fraud is being perpetrated, and the principals are unable to check or stop the fraudulent act of their agents, and ask the aid of the court to assist them!

The Proposition that this is Commercial Paper, and hence is within the Exception to the Doctrine of Lis Pendens results from a Partial View of the Question.

It assumes the fact that this is commercial paper, with no other evidence of that than its form; while it ignores the fact that it is the issue of an agent never having had any authority whatever to issue any paper.

It ignores the fact that the commercial paper spoken of in the exception was acknowledged existing commercial paper at the time when it was attacked, this being the state of the case in every known decision out of which the rule springs; and *it is to the facts of each case* we must look, and not to the general language alone of the opinions in which the decision is announced, *for the real limits of the exception which they recognize.*

Is it a small matter that in the case at bar the court had jurisdiction of the parties and subject matter when the subject matter was a contract? That this paper has its birth only in the fact that this contract was after suit brought converted into this paper manufactured in unseemly haste on purpose to defeat the decree? That if this rule protects this paper, then the court has been

defeated by the act of the defendant alone, and by an act done in defiance of the court?

Is it a slight distinction that this paper was thus manufactured by a fraudulent agent to defeat the court, in full possession of the subject matter and parties; while in the cases in the books the paper was full fledged when suit was brought, and it might be reasonably charged that the interests of commerce controlled the subject matter before the courts attempted to interfere with it?

Is it a small matter that this is a form of paper which is just newly recognized as having the attributes of commercial paper, and that in the cases where this modern doctrine was first laid down the court, at the seme time, except the rights of the people asserted in a direct proceeding in apt time before the rights of third parties are involved?

It is of small consequence, in order to decide whether the interests of commerce are involved, to observe that the litigation of which the purchaser of said paper is to notice, is to save, that in its nature it is apt to be confined to a very few cases; to municipal corporations only where the people need protection against their agents, because then they must act, if at all, by agents, and are remediless unless this litigation is made effectual by compelling all those who deal with their agents to take notice of it.

Is it a small matter that in many cases it is a majority who have no property who thus give away the property

of the minority? A majority who select the agent and yet who do not pay for the losses he inflicts? That the apparent authority is often conferred upon this agent unasked by the people affected, or given without their knowledge, given against their will? Or rather say taken by the adventurer who plans the railroad to get the subsidies passed in an omnibus — read by its title — but with a title so blind as not to advise the parties interested, however vigilant, that a raid is on foot, and that their interests are at stake.

People cannot Protect Themselves by an Appeal to the Courts, unless the Court shall hold the Decree therein to be Effectual.

Is it of no consequence that the protection of the courts is asked in such cases, where the whole people are powerless without that aid to protect themselves; where but two persons, or three at most, are needed to defeat the will of the whole people; where a false clerk of the House and of the Senate can see that apparent power is given to a county clerk who is willing to use it; taken here without any limit of the amount of it; indebtedness which he may create under it; taken so that a false county clerk can issue the county bonds to any amount he pleases; bonds apparently regular, and when once issued no power on earth can defeat in the hands of the wily broker and capitalist, who, to play his part, shuts his eyes and ears and takes no notice, not if the people fill the world with their clamor! So that these two or three men can at pleasure confiscate the entire property of a county! The law being so well set-

tled that back of every bond stand the army and navy of the United States to enforce payment to the last dollar!

Ought there not to be some refuge from such consequences?

We submit that the power is reserved — and reserved by the doctrine of lis pendens — that the judge may still say in such case imitating the manly language of Mr. Justice Grier: *In this court* "it takes at least four rascals to rob a whole people!"

BURTHEN UPON THOSE WHO CLAIM THIS CASE TO BE WITHIN THE EXCEPTION TO SHOW IT, BY REASON OR AUTHORITY.

We stand upon the doctrine stated in this maxim: Pendente lite nihil innovetur: upon this rule, founded in great public policy, which must be adhered to, or there can be no end of litigation. (1 St. Eq. Jur.. Sec. 405.)

It is for those who claim that their case is within an exception to this rule to show it.

It will be for them to show how it is that the court which was in possession of the parties and of the subject matter; the court whose jurisdiction was unquestioned and perfect; whose power was full and absolute—how and when was it that the court lost this power? How is it that in this case the defendants, mere agents perpetrating a fraud upon their principal, are found to be more powerful than the court? How is it that they are able, by resolving the unlawful contract into many parts, by executing it, by doing the very thing which the court was

about to decree they could not do—how is it that they became gifted with this extraordinary power to inflict upon many thousands of people in the temple of Justice—upon the people appealing to their own courts for justice—this irremediable mischief?

It will be for those who maintain this exception to show the principles and cases upon which it rests.

And upon what an overruling necessity, upon what great public interests, must a doctrine be planted which is still seen by the judicial eye and found by the judicial judgment to be salutary, notwithstanding the weighty set-offs against it, as the parent of such mischiefs!

Opponents must admit this Defense good, or are bound to Show how else the People can Protect Themselves.

If the opponents of the power of the law, of the decrees of court, would ask themselves the question whether or not the people have the right of self-preservation, they might discover whether they have not also the right to enforce the surrender of bonds which have been issued without their authority and in contempt of their courts. We take it for granted that these gentlemen concede the people's right to self-preservation and to their own property.

They admit that industry is to be encouraged; that it is important to capitalists, as well as to the people, that there should be a limit to the creation of debt, and even that the decrees of courts are to be entitled to some respect. Doubtless, too, they admit that agents elected to

serve the people, have no right to defraud them; and strangers have no right to share in the fraud, and get no rights by unauthorized contracts.

Now, how are the people to be protected? How is property to be preserved, if a law is to be put through the forms of enactment without the knowledge of the people or of their guardians in the legislature, giving their agents apparent authority, and then this apparent authority, coupled with the document which the agent issues, is conclusive against the people, so that without a penny in return they must surrender their property to pay it?

How is the property of the people to be protected against robbery when it takes this form? simply takes the color of law by an act whose passage is unasked, unknown, whose provisions are in conflict with the undoubted expression of the will of the legislature of the people on the same subject in other acts passed at the same session! and then takes on the color again of law, by a bond issued in the name of the people by agents who have only authority from the stolen act itself!

If courts can do nothing against a corrupt majority in a board of supervisors, tell us how property can be protected against this acknowledged abuse!

We think our opponents are bound to show this court how this can be done; or must look to those of whom they bought their paper for reimbursement.

THE PEOPLE OF WARREN COUNTY WOULD HAVE VOTED DOWN THE ISSUE OF THE BONDS HAD THEY HAD AN OPPORTUNITY—AN ELECTION OF WHICH THEY HAD NOTICE. BUT EVEN THIS MERITORIOUS DEFENSE IS VALUELESS UNLESS THE DOCTRINE OF LIS PENDENS IS HELD TO MAKE IT ONE.

Observe, too, that the only question which the State Supreme Court considered, as they say in their opinion, was whether there was notice given of the election for a sufficient length of time, which question they answer in the negative, and their decree rests upon this finding.

Now the extent of this want of notice was such that in one township, and that most opposed to the election, no notice whatever was given, and in all of them the notice was not given for the required period.

How important a proper notice is to an election needs no comment; but in this instance, it is in evidence that the election could never have been carried for this subscription had a proper notice been given; and that this may be so, is easily seen when the fact is noted that less than half of the voters, taking the standard of the last general election of 1868, voted at all; and counting the vote of the town of Berwick, which was thrown out, there was but 600 majority for the subscription.

Nealy A. Chapin is the only witness on the subject, and while speaking of this election, after saying that there was not a full vote, he is asked:

Int. 11. State, if you know, why there was not a full vote at said election?

And he answers:

I think, in the first place, *it was very imperfectly known that there was to be an election on that subject*, and I think, in the next place, that so far as our people were concerned, there was the same apathy that there always is at any election out of the regular course, and *they had no expectation that an election* could result in the issuing *of that number of bonds* to any railroad company.

He is then asked:

Int. 12. Had such election been generally known, and had there been a full vote, what, in your opinion, would have been the probable result of said election? And he answers: I believe that *the people would have voted against the issuing of these bonds by the supervisors.* Page 375–376.

This is all the direct evidence on the subject, and is only entitled to notice because it accords with the facts and with the presumption of law, that the 30 days given to the people to decide so momentous a question was none too long; that every moment was needed to give them a fair opportunity, and that an election, held without sufficient notice being given, is not worthy the name of an election; and the people are not bound to speculate, whether the result of the election would have been different, if proper notice had been given.

The want of proper notice of an election is the same as the want of an election at all; it is a complete want of power in fact; and is only rendered ineffectual after the bonds are issued, because as the Supreme Court tells us, in Knox Co. *v.* Aspinwall, the bonds themselves,

when they contain a statement that they are issued in pursuance of the given law, and the fact of subscription by the board, give the purchaser of the bonds "a right to assume" that the vote had been obtained.

Unless, then, the filing of this bill in apt time shall give force to this objection, it is now but a mere irregularity! Thus the most essential requirement of the law, the popular assent, is no longer required, is no longer essential, provided the bonds are issued by the officer named in the law! And this is still true, even if the whole people represented by one of their number shall appeal to the courts to prevent the issue; for, even then, if the county clerk shall choose, he may issue the bonds in defiance of injunctions, in contempt of the authority of the court and of the will of the whole people, and this court must, at the will of every bona fide purchaser of them, hold them good; and compel the county officers, unless they shall resign and evade their duty, to pay the bonds by levying and collecting the proper tax from the property of the people!

We respectfully urge that this fact is sufficient reason why the decree against these bonds in this direct proceeding must be held a good defense; because we have, we hope, shown that there is no other remedy which the tax-payer can have in such case; because otherwise it is precisely when he is most entitled to the protection of the court, when there has been no election, when his pretended agents have acted without any power, that the court, governed by principles, which must now be considered judicially settled, must refuse him relief.

To Sustain this Defense is but a Just Tribute of Respect to the State Court.

The Supreme Court of the United States have justly said, in Taylor *v.* Carryl: "THE DECISIONS OF THE FEDERAL COURTS THAT DISCLOSE THIS AIM, VIZ: OF GIVING 'PREFERENCE TO SUCH PRINCIPLES AND METHODS OF PROCEDURE AS SHALL SERVE TO CONCILIATE THE DISTINCT AND INDEPENDENT TRIBUNALS OF THE STATES OF THE UNION, SO THAT THEY MAY OPERATE AS HARMONIOUS MEMBERS OF A JUDICIAL SYSTEM CO-EXTENSIVE WITH THE UNITED STATES, and submitting to the paramount authority of the same Constitution, laws and general obligations, and that embody the principles and modes of administration to accomplish it, HAVE GONE FROM THE COURT WITH AUTHORITY, AND HAVE RETURNED TO IT, BRINGING THE VIGOR AND STRENGTH THAT IS ALWAYS IMPARTED TO MAGISTRATES OF WHATEVER CLASS, BY THE APPROBATION AND CONFIDENCE OF THOSE SUBMITTED TO THEIR GOVERNMENT."

20 How., 495.

It is a decision of this class we ask of this court; a just decision in harmony with that of the State Court, which shall go from this court, and return to it, "bringing the vigor and strength imparted by the approbation and confidence" of the people submitted to its government.

To sustain this defense will be but a just tribute of respect to the State Court. It will simply affirm the decision which that court, having first obtained jurisdiction of the parties and subject matter—all the parties being citizens of the State, and the subject matter being the contract of State corporations acting within the State

only, and created by State laws—after the maturest deliberation has made.

THAT THE EFFECT OF THIS PROCEEDING WILL BE A GOOD DEFENSE IS SUPPORTED BY AUTHORITY.

Besides, the effect of this proceeding stands upon the authority of Knox county *v.* Aspinwall, 21 How., 545, where Mr. Justice Nelson, delivering the opinion of the court, says:

"We do not say that the decision of the Board would be conclusive in a direct proceeding to inquire into the facts previously to the execution of the power, and before the rights and interests of third parties had attached." *

What does this mean? Was it only meant that this proceeding might serve to show this want of power or excess of power, but that it would be immaterial when shown, or could be made immaterial after it was instituted, at the will of the county officers, by a second illegal act, placing the bonds in the hands of bona fide purchasers before maturity? If so, this is mere child's play—a promise with very little in it; a thin disguise of a doctrine by which, in an age of corruption and defalcation, the people, who must act by agents, were to be handed over to them to be plundered.

But it is most unjust to impute such an intention to that high tribunal; they meant what they said; "protect yourselves, tax-payers, by a direct proceeding, before the bonds get into the hands of innocent purchasers, and we will stand by you."

No body of judges, having the interests of the people at heart, could fail to recognize the necessity of affording the public protection in the courts against the action of corrupt agents.

In this intimation that a defense could be found in a direct proceeding, the Supreme Court, while adopting a severe and rigid rnle enforcing the liability of municipal corporations for their bonds, going beyond the English courts to hold these bonds commercial paper, promises the people that they should not find the sword of Justice too short or weak to deliver them.

The court recognizes the right of the majority to give away the property of the minority to railroad companies for supposed public good; but the court never will deny to the minority the right to protect themselves by a prompt appeal to them. To give this protection, an appeal to the courts must be held effectual.

The People have a Vested and Inviolable Right to Protection, given by the State Court.

We respectfully submit that enough has been said to show that the people, the citizens and tax payers of Warren county, by their litigation in the State courts and the decrees therein, possessed vested rights to the protection which should be afforded by courts to those entitled to it; and that these rights being once obtained and vested are as inviolable as any vested rights of property whatever. These are surely rights, vested rights, to all legal intents as completely as the right to possess property, for they are the rights of the citizen to the protection of his property.

in suit—which could not be rightfully wrested from its jurisdiction which once attached, while they were within the limits and within the jurisdiction and power of the courts in a case then actually pending.

In this proceeding, instituted long before the plaintiffs appealed to this court, the State court has decreed not only that the election, subscription, orders of board to that end, are void and unauthorized, and enjoined the issue of the bonds and coupons; but finding them to have been issued in contempt of its authority, the court has now gone further, and making defendants, as we hold was unnecessary, the plaintiffs in these suits, who have bought into this litigation, has now found that they are not bona fide purchasers, and has declared the bonds and coupons illegal and void, and directed them to be delivered up to be cancelled, and perpetually enjoined the defendants from prosecuting any suit or making any claim thereon.

It is, therefore, respectfully submitted, that these decrees should be held binding, not only upon their merits as acts of justice, but that this court should so hold in accordance with that disposition, which has so far been exhibited by both the National and State Courts in all their intercourse with each other, "to avoid conflicts of authority between each other; to establish and promote rules of comity; to bring the whole system of the respective governments into general and harmonious action."

III.

WANT OF AUTHORITY.

The act of March 4th, 1869, controlled the amount of bonds the county had the right to issue, and fixed it at a sum "not exceeding $100,000."

This is also the same maximum subscription fixed for the subscriptions of counties, cities and towns by the amendment of March 26, 1869, the length of the road in the county being 33 miles, and that act declaring the aggregate subscriptions shall not exceed $3,000 per mile. The bonds from which these coupons were detached are a part of an issue of $200,000 of bonds, and the plaintiffs cannot recover against the county upon said coupons, because they were issued by the county clerk without any color of authority.

Excess Justified Originally under Vote to Another Company.

What is the answer to this? If the answer had been made by the county officers at the time when the election was held, it would be in the language of both the order of the board calling the election, and also of the notice of that election, viz.: the additional $100,000 is the "$100,000 *previously voted*"—which may be more than the charter of this company allows, but it is claimed to have been previously voted to the St. Louis, Alton & Rock Island R. R. Company, and transferred to this company with the express consent of the legislature.

NOW JUSTIFIED UNDER THE REIGN OF LICENSE INAUGURATED BY THE ACT OF MARCH 28TH.

But this position being found indefensible, the answer with which we are now met is the act of March 25th, 1869, an act never heard of [illegible] by officers or people at the time the subscription was voted.

The act of March 25th, if it had any application, is a very useful act to have in such cases; for under its loose provisions, it is impossible to go wrong. It has been set out above (p. 12), but it may be shortly stated as an act to authorize eight counties named in it, and their towns, if under township organization, to take any amount of stock they please in any railroad company organized or to be organized, whose road shall pass through either of them.

THIS REQUIRES THAT THE ACT OF MARCH 25TH SHALL REPEAL BY IMPLICATION THE ACT OF MARCH 4TH.

But this afterthought cannot help out this case; for the plain reason that this act of March 25th was never meant to have this effect by the legislature when they passed it. To have this effect, it must repeal by implication the act of March 4th, which regulates the whole power of this company to contract its stock to municipal corporations on or near its line, including these eight counties and their towns named in the act of March 25th. This act of March 25th must also, be repealed by implication, by the act of March 26, '69, which includes the same municipal corporations, as we say, and *nine-tenths of them*, viz.: every town, and every county not under township organization, as our opponents will admit.

Rule is no repeal by Implication unless Absolutely Necessary in order that the Later Act shall have any Meaning at All

Now, repeals by implication, and certainly double repeals of this kind, are not favored; the leaning of courts is so strong against repealing the positive provisions of a former statute by construction, as almost to establish the doctrine of "no repeal by implication." Dwarris' Stat., p. 531: "The rule is that there is no repeal by implication, unless it is absolutely necessary *in order that the later act shall have any meaning at all.*"

"A repeal by implication carries with it a reflection on the wisdom of former parliaments," says Dwarris, p. 674; and if this effect be given, it needs no comment to show the reflection thus cast upon the legislature of '69.

Hence a repeal by implication is the last resort when all canons of interpretation fail; and the question of construction presented here, in the language just quoted from Dwarris is, "Is it absolutely necessary to find that the law of March 25th repeals the law of March 4th by implication, "in order that the later act (March 25th) shall have any meaning at all"?

No Difficulty in giving sufficient Meaning to Act of March 25th, by leaving in its control Contracts with all other R. R. Companies.

This question our opponents must answer in the affirmative, or their case is at an end. Now, we find no difficulty in giving to the latter act the following meaning, viz.: "The municipa lcorporations named may take what

stock they please in any railroad company organized or to be organized where it shall run through either of them; but not to exceed the amount of subscription which the several companies, by the provisions of their several charters, shall have the right to contract for with said municipalities." This leaves to the latter act what we shall presently try to show was the true scope the legislature meant to give it; and as it embraces contracts, with all present and future companies, by near a hundred of municipalities, it is left with certainly sufficient meaning for a local act. For our Constitution says, a local act shall embrace but one "subject," and our State court, giving the most liberal construction given by any court to such a constitutional provision, have held that the widest and most liberal interpretation to this "subject" will only admit of the regulation in one act of the contracts for subscription by municipalities to one railroad company, which regulation is, they hold, germane to the one subject, viz., the charter of said company.

Schuyler *v.* The People, 25 Ill., 182.

Application of Great Rule of Construction, viz., to consider the State of the Law, the Mischief and the Remedy.

But construction is merely a means of ascertaining the intention of the legislation which is to be sought, and when discovered, is to prevail over the literal meaning of the words of any part of a law.

What, then, was the intention of the law-makers of 1869?

This intention is to be discovered not alone by considering the words of any part of a law, but by ascertaining the general purpose of the whole, es pecially by considering what the law was before the making of the statute, the mischief which existed, and the remedy which was meant to be applied.

"This," says Kent, speaking of the great sanction given to this rule of construction, "has been the language of courts in every age." It is adopted by our courts, Federal and State. (Potter's Dwarris, p. 185, and cases cited.) And it is, says Lord Coke, "the very lock and key to set open the windows of the statute." (2 Inst., 301.)

The law, as it stood, touching the R. R. Company, when the legislation of that session was passed, was the general railroad law of 1849, which gave to *counties alone* the right to take stock, and fixed the maximum subscription at $100,000, to be determined *by a majority of the voters of the county*. (Laws of '49, p. 33.) The original charter of this company is the act of February, 18, '65 (Priv. Laws, '65, vol. 2, p. 209), and contained no provisions for subscriptions by municipalities.

Thus the law stood on Jan. 8, 1869, when the law of March 25, '69, was introduced into the House of Representatives; and on Jan. 12, '69, when the law of March 26, '69, was introduced into the same body; and on Jan. 23, '69, when the law of Mar. 4, '69, was also introduced. Thus the law stood when the law of March 4th was approved by the Governor and became a law.

MISCHIEF WAS LACK OF PROPER POWER ON PART OF MUNICIPALITIES ALONG LINE OF THIS COMPANY TO SUBSCRIBE TO THE STOCK OF THIS AND OTHER COMPANIES. REMEDY GRANTING THE POWER TO CONTRACT WITH THIS COMPANY, ACCCOMPANIED BY FRESH GUARDS AS TO NOTICE OF ELECTION, AND AMOUNT, AND AGAINST DOUBLE SUBSCRIPTIONS BY ACTS OF MARCH 4 AND 26. REMEDY AS TO OTHER COMPANIES BY ACT OF MARCH 25TH.

The supposed mischief attacked by the laws of this session was the lack of a proper power on the part of the counties, cities and towns, near the road of this company, to subscribe to its stock, to aid in its construction, and to subscribe to the stock of other companies, organized or to be organized, to aid in their construction; and to this mischief, so far as it relates to this company, the laws of March 4 and 26 are directed; and the remedy applied was to grant the power, accompanied by fresh guards as to the notices to be given of the election required, while expressly requiring the approval of a majority only of those voting at such election; and fixing a series of restrictions on the amount so voted by each municipality, to guard against the creation of too great indebtedness, and guarding, also, against double subscriptions, by fixing an aggregate amount, which the subscriptions of all the municipalities in a county should not be allowed to exceed.

JOURNALS SHOW ACT OF MARCH 25 INTRODUCED FIRST, AND PASSSED NEARLY EVERY STAGE FIRST. IT WAS MEANT TO GIVE POWER WHEN NONE EXISTED.

Of these three laws, the law of March 25, as we have seen, was first introduced and passed nearly every constitutional stage of its passage first; and as the counties

and towns named in it are those lying in their order along the line of this company, was, doubtless meant to provide for the same contracts by the parties who drew it, but on the face of it the evil aimed at in it, was one existing as to all railroads, not only to those existing, but to those which should be built, to provide for the subscription to their stock of the eight counties therein named, and their towns, if under township organization. It was aimed to give power where none existed. It was meant to embrace all roads; while it was especially suited to the needs of this company, which was the only company then asking subscriptions from the municipalities named. When it was introduced in the House there was no law whatever on the subject save the general railroad law, nor was there any such law when it had passed the House and it had passed the first and second readings in the Senate, and had been reported back by the Committee on Railroads, (with an amendment, which we, unfortunately, have not, and which would, probably, render "construction" unnecessary.)

LAWS OF MARCH 4 AND 26 INTRODUCED AND MEANT SPECIALLY FOR THIS COMPANY, AS THEY STATE ON THEIR FACE.

Nor was there such a law, until, while this act was so standing upon its third reading in the Senate, this law of March 4 was passed providing specially for this company. Even then the legislature thought the evil not sufficiently remedied, and passed, but not until the act of March 25 was passed, the law of March 26, which was passing the Senate when the laws of March 4 and 25 were passing the same

body, and was actually passed and approved after both. This law of March 26 included every one of the corporations, as we claim, included in the law of March 25th; and as our opponents must admit, every one of the corporations save a tenth perhaps. So that so far as this company is concerned, after being told on March 25 that these municipalities could take what stock they pleased in it, the same legislature on March 26th told every one of them, or certainly (accepting the construction of our adversaries) told nine-tenths of them, including the inferior municipal corporations extending to every inch of this county as well to every other county and town named in the act of March 25: "You cannot take what you please; nor can you together take in the aggregate exceeding $3,000 stock per mile for the distance this road runs through your county."

Thus, in correcting this mischief, *several remedial statutes were passed pari passu together*, of which the last became first and the first last, and this apparently not by any design but by accident.

Here was first a mischief common to many companies, both those organized and to be organized; and it was provided for by a general and unlimited power in the act of March 25.

Here was next the same mischief existing as to this single company, for which special remedies were afterwards applied by the acts of March 4 and 26.

Intention of Legislature.

Here was a general intention in one, and a special

intention in the other act; and he who wishes to give effect to the intention of the legislature must give effect to both: to the latter as to the company to which it is special and so far as it is special; to the former as to all the rest of the subject-matters — to all other companies, perhaps to this company, so far as shall not conflict with the special intention shown by the special laws.

APPLY SAME RULE OF CONSTRUCTION, DISCARDING JOURNALS, AND YOU HAVE SAME RESULT.

Again, if it be doubted whether we can look into the journals and get any help for the proper construction of these statutes for the purpose of this case, let us for a moment consider the same question, entirely disregarding and laying aside the information of the journals.

As the laws read on the statute book, the Act of March 4, was, first, next that of March 25, and last of all that of March 26, and the question recurs what was the intention of the legislature, which we shall try to answer by the aid of the same cardinal rule of interpretation we have just applied. Then when the law of March 4 was passed, the mischief which existed was exactly that just stated, and needs only to be restated, viz.: the want of any power on the part of this Company to contract subscriptions of its stock with the towns and cities on or near its line in exchange for their bonds, and the want of *proper regulations or restrictions*, also, of the power of the Company to make similar contracts with the counties.

This we infer was the mischief which the Legislature

conceived existed, and which they meant to remedy by that law.

NEITHER GOOD SENSE NOR SOUND LAW TO HOLD THAT LEGISLATURE CHANGED THEIR MINDS AS TO THE MISCHIEF AND REMEDY AS REPEAL BY IMPLICATION REQUIRES. TRUE CONSTRUCTION THAT ALL THREE ACTS CONSTITUTE ONE STATUTE.

When the act of March 25 became a law, is it good sense or sound law to hold as a principle of construction, that the legislature had changed their minds as to the mischief and as to the proper remedy? We say it is not, but on the contrary we say that for the purpose of construction, all acts passed at the same session of the legislature are to be considered as one statute, and are regarded for the purposes of construction as passed at the same time, having been in the eye of the law, before the same Legislative Assembly at the same time, although in different stages of progress, and so far as they bear upon each other parts of one code or statute, "governed by one spirit and policy, and intended to be consistent and harmonious." This doctrine is fully borne out by the following authorities, viz.:

State *v.* Bell, 3 Iredell, 506.
State *v.* Qockley, 3 Blackfd., 249.
Brown *v.* Barnes, 3 Dallas, 337.
McFarland et al. *v.* The Bank, 4 Ark., 412.
City of St. Louis *v.* Alexander, 23 Mo., 510.
Smith's Comm., sec. 641, p. 755.
Dwarris, 569, 1 Kent's Com., 463.

ALL ARE TO BE CONSTRUED AS IF PASSED AT SAME TIME ON FIRST DAY OF SESSION.

That all the laws passed at one session are to be read, for the purposes of construction, as if passed at the same time, and as of the first day of the session, the case of Nares et al. *v.* Rowles, 14 East., 520, is directly in point. In that case the question was, whether the following words of an act should include acts passed at the same session passed prior to its own passage; viz., "any act *to be* passed in the present session;" and the court held that it was to be read as if the words were "any act of the present session." "We know," says Bayley, Judge, "that acts are frequently a long time in passing through the two houses in succession, and much injustice would arise, in many cases, from reading the language of an act with reference to its passing through either house exclusively; but *it must be read with reference to its progress generally;*" * * though an act do not commence to be operative till the day it is passed, when it receives the royal assent, it may be considered as in progress through the two houses of Parliament *from the first day of the session, and, therefore, its language will have reference to that time.*"

In discussing a similar question, in Kenney *v.* Beverly, 2 Hen. & Munf'd, 343, Judge Roane, while construing several laws passed at the same session, gave no weight to the fact that one passed later than another, saying:

"The subject was, therefore, before the legislature at the same time with the act immediately in question; and although in fact the latter act passed a few days before

the former, *this court will judicially know that that may have been merely accidental;* and that in this session of revisal *the whole subject of our laws was depending at the same time before the legislature.*"

And in that case the learned judge reached the same conclusion which we say is the true one here; viz., that *the matter* special, to wit, the powers of this company to make contracts of its stock with municipalities, having been dealt with by one act, the general language of another act of the same session *must be construed as not to extend to it.*

He continues: "This whole subject, then, was depending at the same time before the legislature; and, therefore, *as another act related to this subject, the 35th section, now in question, did not mean to extend* to this case of an omission to give in land for assessment."

It is very clear from these authorities that the only canon of interpretation which gives any color to the construction which justifies their views, viz., to the repeal by implication of the act of May 4, (for we take it for granted that there is nothing in the convenient doctrine broached by counsel that each law shall stand as an independent license and a fresh power, a doctrine which practically has the effect of a repeal upon those laws containing powers which are restricted) to wit, the canon, posteriores leges priores contrarias abrogant, is in the case of laws passed at the same session substantially valueless, and least and last of all to be regarded.

So that to the leaning of courts, which is so strong

against repealing the positive provision of a former statute by construction as almost to establish the doctrine of "the repeal by implication," is now to be added the doctrine, that these laws are sections of one statute, to be held for the purposes of construction as passed at the same time, and that the first day of the session.

It is very evident that there is but one mischief which the legislature undertook to remedy by these several statutes, so far as they relate to the same subject matter, to wit, to the powers of this company; and we get back *to the same conclusion, by a different road*, that we reached by the aid of the journals.

Improper to Impute the Inconsistencies required by the Doctrine of Repeal by Implication.

How absurd it would be to attribute to the legislature the inconsistency of seeing one mischief in the law as it stood before the act of the 4th of March, and of correcting it by that law; and then seeing a diametrically opposite mischief created by the restrictions imposed by the law of March 4th, as the state of the law before the passage of the law of March 25th, and remedying it by that law so as to undo what they had just done! And what a fresh absurdity is seen in passing then to the law of March 26th, and attributing to the legislature a new conceit of a new mischief again, the reverse of that of the day before, which they correct by a law again as opposite as that just repealed!

On March 4, saying to the counties and towns on the

line of this road: "You can take any amount of its stock you please, but not exceeding $100,000!"

On March 25 saying to a part of the same counties and towns: "You can take just what stock you please!"

On March 26, saying to the same counties and towns included in the latter law, certainly to all the towns and to all the counties under township organization—that is to nine-tenths at least of the same municipalities: "You shall not take, all of you together, more than $3,000 per mile for the distance it traverses your county!"

Nothing could be more unjust than for a court to impute such inconsistency to the legislature.

Test this Construction by the Rule that these Acts constitute One Statute.

But that the construction we have given these acts is the true one, every canon of interpretation will show should we apply them in turn. Let us rapidly test our construction by them. First: The true rule is, that they are one statute, and each act a separate section of that statute; and that the rules of interpretation are those which apply to the sections of the same statute.

Now suppose a statute is passed with three sections; the first, (the act of March 4) The Rockford, Rock Island & St. Louis R. R. Co. may contract for subscription not exceeding $100,000 of stock with counties and towns, etc., along its line. The second, (the act of March 25)

the county of Warren and seven others and their towns, if under township organization, may take what stock they please in any company whose line runs through either of them. The third (the act of March 26) The Rockford, Rock Island & St. Louis R. R. Co. may make such contracts for subscription with counties, cities and incorporated towns in counties not under township organization and with towns and cities in counties under township organization through which its line runs, but not to exceed $3,000 per mile for the distance the road traverses the county, and not to exceed for cities and incorporated towns $10,000 for each 1,000 of inhabitants in the same.

Now what is the construction which should be put upon such a statute as to the powers of the Rockford Road to contract with the municipalities through which it ran? Would anybody be heard to contend that, by the second section, it could deal as the municipalities chose, they taking what stock they please, notwithstanding the express and special restrictions of the first and third sections? Suppose it was a will or a deed, and the same problem is presented to find what was meant, who would fail to give effect to every part of it? Who does not know that it is a cardinal rule, that in the construction of the second section, or of any part of the statute, every other part of the same statute must be taken into consideration, *i. e.*, ex visceribus actus, for that, as Lord Coke says, 1 Inst. 381. "best expresseth the meaning of the maker?"

Now, what is it that requires construction? What is it we have to deal with? The first and third sections of the

statutes are plain enough; no dispute about the first, and none about the third, except as to whether counties under township organizations are embraced in it, as to which dispute it is in no wise essential to our construction how it is determined.

The only question is what do these words mean, viz: What is the meaning of the first ten lines of the 2d section of our statute, to wit; "Said counties or towns may subscribe for shares of stock in any railroad company already organized, or hereafter to be organized, which passes, in whole or in part, through the said counties or towns, or any or either of them, *to such an amount as any of the said* counties or towns, or either of them, shall *determine and deem best and proper.*"

Does the legislature mean that the counties and towns may take what stock they please in the Rockford, Rock Island & St. Louis R. R. Co.? What, in short, is the meaning of these general words, "any railroad company;" "such an amount as any of said counties shall deem proper"?

Now, the answer is one in which good sense and authority unite, viz: "These general words are restrained by the whole scope of the statute, and the special language of the 1st and 3d sections show that it was meant to be controlled, so as to except the railroad company, whose powers to make these very contracts with those very municipalities, were therein regulated and restricted."

When the legislature, in the Act of March 25 (which we call the 2d section), used terms which might have conferred

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When the legislature, in the Act of March 25 (which we call the 2d section), used terms which might have conferred

this power claimed by the plaintiffs, at the same time the legislature took care that these terms should not carry this power to this company, and they did this by the Acts of March 4 and 26 (which we call the 1st and 3d sections of the statute), in which they fix and regulate that power within limits.

These general words of the 2d section are restrained —as general words easily dealt with—by the scope and purpose of the 1st and 3d sections specially relating to this company.

AUTHORITY OF ACT OF MARCH 25TH TO COUNTIES TO TAKE WHAT STOCK THEY PLEASE IN COMPANIES NOW ORGANIZED, OR TO BE ORGANIZED, IS SUBJECT TO THE LIMITATION OF THE AMOUNT OF THEIR CAPITAL STOCK. THIS IS AN INCIDENT SUPPLIED BY INTENDMENT.

Indeed, it is clear that the county and company could not contract for stock beyond the amount that the charter of the company allowed the company to issue. No one would contend, that the amount of the capital stock of this railroad company could be increased by such a law. For these general words are not to be taken absolutely: they are to be read, "counties may take what stock they please, but only what the company has to give and is allowed to give by its charter."

"General words that such a thing shall be void, do not make it void simpliciter, but secundum quod, or quoad such a person, or to such a purpose. General words cannot revoke or alter any particular statute."

Lyon *v.* Wise, Bridgman, 124.

"General laws do not take any particular customs. An affirmative statute does not take away an earlier statute, eo potius, if the former be particular and the latter general."

King *v.* Moor., 2 Mod. 128.

If a statute have general words, it shall not enable an infant or feme covert, contrary to the common law.

Hutchins *v.* Player, Bridgman's Rep., 315.

Where a statute declared the King shall seize private property, Coke says: "But this is intended, after an office found, for in statutes incidents are ever supplied by intendment."

2 Inst., 221,

Where an act of parliament gives power to parties of the peace to take order in any matter, "according to their discretions," this shall be understood according to the rules of reason, law and justice, and not governed by private opinion.

5 Rep., 100.
Dwarris, 769.

"At the King's pleasure," is understood of the King in his courts by his justices.

Dwarris, 779.

TREATING THE THREE ACTS AS ONE STATUTE, THE GENERAL WORDS OF EITHER ARE TO BE RESTRICTED BY THE CONTEXT, BY THE SCOPE OF THE WHOLE STATUTE.

It is certainly clear then upon reason, as well as upon authority, that the general power granted by the general words of the 2d section, Mar. 25th, is subject to this limita-

tion, to wit: of the amount of stock the company may contract, imported from the charter of the company, and if to this limitation why not to the other limitations of that charter?

IF SUBJECT TO THIS LIMITATION, WHY NOT TO THE OTHER LIMITATIONS OF THE CHARTER, AS AMENDED BY ACTS OF MARCH 4 AND 26.

The following are some of the authorities which show that general words in a statute, as in any instrument, are always restrained by the context:

Lord Romilly lays down this doctrine in Petty *v.* Solly, 26 Beav. 510, as follows:

"The general rules applicable to particular and general enactments in statutes are very clear, and the only difficulty is in their application." * * "Again, whenever two parts of a statute are contradictory, the court endeavors to give a distinct interpretation to each of them by looking at the context.

"The rule is, that whenever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, *the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the subject* to which it may properly apply. Bonham's Case, 8 Coke's Rep., 118 b.; Churchill *v.* Crease, 5 Bing., 180.; Standon *v.* The Univ. of Oxford, Sir W. Jones, 17."

In the Cargo Ex Argos, 5 Privy Council Appeals (L. R. 74,) p. 154, the same doctrine is laid down:

"The generality of words of a statute may be restrained by evidence of intention to be collected from other parts of it. This rule is applied in case of statutes in *pari materia*. The St. Cloud Bro. and Lush, 4: The Dowse, 3 A. & E. 135 (L. R); Everard *v.* Kendall, 5 Com., p. 428 (L. R.); Smith *v.* Brown, 6 Q. B., 727 (L. R.); *where there are subjects to which the words are properly applicable, and which would satisfy them where construed in a limited sense.* See also Simpson *v.* Blues (L. R.), 7 C. P., 290.

So "persons interested" in the maintenance of bridges, in the sense intended by Sec. 7 of an act relating to use of locomotives on bridges, shall not be read so as to include "inhabitants of the county;" nor shall the word "bridges," in that section, be read so as to include county "bridges." "Because county bridges are *provided for* by §§ 6 and 13 *which sufficiently meet any danger* which might come from the use of locomotives on bridges." "The *rights of the public being protected* by §§ 6 and 13, * * the statute *cannot mean that the public shall be relieved*" from the care of county bridges.

Kelly, C. B., Queen *v.* Kitchener, 2 Crown Cas. Res., p. 93 (L. R), Feb. 2, '74.

So, in Cope *v.* Doherty, 2 De Gex. & J., 623, the words "no owner," in the 504th section, can only mean, and must be read, "no British owner," and as to the words, "any sea-going ship," they must, of course, either mean, and must accordingly be read, either "any British sea-going ship," or "any British and foreign sea-going ship," according as the act is limited in its operation to British

ships, or extended to British and foreign ships." * * * * * * The court say:

"The words of these sections are no doubt wide and extensive. The words 'any sea-going ship,' construed with reference to the interpretation clause, would embrace every vessel navigating the sea, which is not propelled by oars; but it is not because general words are used in an act of Parliament that every case which falls within the words is to be governed by the act. It is the duty of the courts of justice so to construe the words as to carry into effect the meaning and intention of the legislature. We had occasion very much to consider this point, in Hawkins *v.* Gathercole (6 De. G. M. & G., 1), in which case we restrained the effect of general words in the act on which the case depended, and there are many cases in the books to the same effect, some of which are referred to in that case, and others not, but are to be found in *Viner's Abridgment*, title *Statutes*."

"Nothing, I consider," says Jessel, M. R., discussing the construction of such words in a deed in Howard v. Earl of Shrewsbury, Law Rep. for '74, p. 391, "is better settled than that these *general* words, even where they would pass the land ex vi terminorum, are restricted by the recitals and what *is called the scope of the instrument.* This is illustrated by the case of Hopkinson *v.* Lusk, before Lord Romilly, 34 Beav., 215. The principle is that, though words of a specific description are not easily dealt with, yet general words are; and that, though general words may be in themselves large enough (which I do not think they are, because there is no evidence to comprise

the property in dispute), yet if, upon the whole scope of the instrument, as to which special regard is to be had to what I call introductory recitals, it appears it was not the intention of the parties to pass these properties, it will not pass them."

This is the rule as laid down in Dwarris' Stat., p. 514, citing many cases. Again. "Where a general intention is expressed, and the act also expresses a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception. Churchill *v.* Crease, 5 Bing., 180; Id., 462–3. While, if a particular thing be given or limited in the preceding parts of a statute, this shall not be taken away or altered by any subsequent general words of the same statute." Standon *v.* Oxford Univ., 1 Sir W. Jon. 26.

In the City of New Haven *v.* Whitney, 36 Conn., 376, such general words, to wit, "other public work or improvement" in one section of a statute were held not to include "highways," because, say the court, "it would clearly be a strained and unjustifiable construction of the language to hold that it embraced the repair of highways, *when that subject had been explicitly and exhaustively provided for, in a preceding and perfectly distinct part of the statute.*

"The intent of the legislature is not to be collected," said Best, C. J., "from any expression, but from a a general view of the whole of an act of Parliament." 4 Benj., 196. "Terms of general import must be limited by the scope and character of the matter elsewhere named in the act."

Drake *v.* Phillips, 40 Ill., 389.

In King *v.* Fowler, the general words of the act of 25 Geo., 3 c., 51, were held to be controlled by the rest of the same act. 3 Term R., 71.

In King *v.* Rogers, 10 East., 273, the general words of a section of the statute of 46 Geo., 3, which declared that a former statute should be "*repealed*," were controlled by the special language of the rest of the act, so as to read "suspended for a limited time." This "word," said Lord Ellenborough "is not to be taken in an absolute sense, if it appear from the whole act to be used in a limited sense. And it does so appear by the 14th section, which specifies that the act shall commence on August 1, 1806, and shall continue in force until March 25, 1807. *Then bringing forward that clause and incorporating* it with the first, it is the same as if the act of 46 Geo., 3, had said in terms that "the provisions" in the 42d of the King should be repealed from the 1st of August, 1806, until March 25, 1807; which, in effect, is to *suspend its operations only for a limited time.*"

"The safe and established rule of construction is that the intention of the law-giver and the meaning of the law are to be discovered and deduced from a view of the *whole*, and every part of a statute taken and compared together.

"It is the most natural and genuine exposition of a statute to construe one part by another of the same statute, for that best expressed the meaning of the makers, and such construction is ex viscesribus actus. And this construction of itself imports ex vi termini.

"If therefore any part of a statute be intricate, obscure or doubtful, the proper way to discover the intent is to *consider the other parts of the act, for the words and meaning of one part of a statute frequently lead to the sense of another;* and in the construction of one part of a statute every other ought to be taken into consideration. E. G., a clause taken by itself in general, and literally taken extendeth to *all appeals*, but ex antecedentibus et consequentibus fit optima interpretatio, hence it was held that *certain appeals* are not within the act, because *apparently not meant to apply to any except a part of appeals*, because *that part is not within the antecedent clauses.*"

See Dwarris, 764; and also for numerous instances in which prior clauses are restrained by subsequent clauses in a statute.

"*General words*, it is established, may be qualified by subsequent clauses in the same statute; but "a thing given in particular shall not be tolled by general words." (Id., 765.)

"*Generalis clausula non porigitur ad ea quæ specialiter sunt comprehensa.*

This is also a maxim of the civil law: "*Illud potissimam habetur, quod ad speciem directum est.*

"The general rules must not be alleged in confutation of the special provisions; but when the law *descends to particulars*, such mere special *provisions must be understood as exceptions to any general rule laid down to the contrary.*

"The generality of the enacting clause shall be restrained and qualified by the preamble, it is said.

If the not restraining the generality of the enacting clause will be attended with an inconvenience, the preamble *shall* restrain it. (Id., 761.)

Illustrations of the Rule shown even in Construction of Statutes in pari materia.

Statutes relating to the same subject matter, which are passed even at different sessions by different legislatures, being in pari materia, are also to be construed together, and although not, in the same intimate sense, with acts of the same session of the same legislature, are to be read and considered as but one statute. Here, too, the rule of construction is uniform, which requires that the general language of such acts shall be construed with reference to the general intention of the whole, and the illustrations of this, given in the books, might be multiplied to any extent.

We cite the following:

But a later statute which is general does not abrogate a former which is particular; thus the Stat. 5 Eliz., 4, that "none use a trade without being apprentice," did not take away 4 and 5 Ph. and M., 5, that no *weaver* use, etc., (*a.*) 6 Rep., 19 b, because there is a special statute for the weaver.

Dwarris, p. 674.

So the Stat. 1 and 2 Phil. and M., cap. 10, "that all trials hereafter to be had for any treason shall be had according to the course of the common law, and not otherwise," doth not abrogate the Stat. 35 H. 8, cap. 2, of trial of treasons beyond the seas, notwithstanding the

negative words, because it was not contrary in matter, for that was not triable by the common law."

Foster's case, 11 Rep., p. 119 (62b—63a.)

The Stat. 26 Geo. 3, c. 167, referring expressly to a former statute, says that every person having served in the militia may select a trade "as freely and within the same provisions," etc. It was held clear on the meaning of the acts, which were made in pari materia, and referring to the titles and preamble to discover the occasion and object of making the laws, that they related to persons exercising trades, and not to common laborers or husbandmen." 37 R., 138.

Dwarris, 763.

"Upon all acts of Parliament such construction should be made as that one clause shall not frustrate and destroy, but on the contrary shall explain and support another;" sound exposition requiring effect to be given to every significant clause, sentence, and word in a statute." Id.

A general enactment in a later statute does not repeal a particular enactment in an earlier statute, unless the intention to do so is manifest, or THE IMPLICATION IS IRRESISTIBLE. Conservators of Thames *v.* Hall, 3 L. R. C. P., 415.

"All land in kingdom" in the land tax act, shall not include "ground and soil of Thames enclosed, etc." because earlier exempted from taxes by a particular statute. William and P. Richard, 4 T. R. 2. "All property within such city" in a law of (57) shall not include "farm lands" in the city exempted from taxes by a law of '52.

Blain *v.* Bailey, 25 Ind. 65.

Provision in law of 1786 that "Suits may be brought before the board without limitation shall not include suits which by an earlier law of 1785 must be brought within 12 months.

Goddard *v.* Boston, 20 Pick., 110.

In Smith *v.* McCool, 1 Black., 470, the Supreme Court held that the general words "All actions," of the statute of '57 amending the statute of descent which provides that "In all actions and courts the grantee of an illegitimate child shall be deemed to be the owner from the date of the conveyance," were held not to include an action of ejectment brought in '55 by said grantee and could not operate so as to repeal the provisions of the prior ejectment act which declares that "No person shall recover in ejectment" unless he had title at the time of commencing the action.

The court say, Swayne, Justice, delivering the opinion: "If the plaintiff can recover in this action, it must be because the act of 1857 impliedly repeals this provision (of the ejectment act) as to this case. If there were no such statutory provision, the act of 1857, being in derogation of the common law, would be construed strictly." "A repeal by implication is not favored." "The leaning of the courts is against the doctrine, if it be possible to reconcile the two acts of the legislature together. Sedg. Stat. and Const. Law, 127; 4 Sill and J. I. Canal Co. *v.* Railroad Co.; 5 Hill, 24 Bowen *v.* Leore; 2 Barb. S. C. 316, Williams *v.* Potter.

"We see nothing in the act of 1857 *which indicates a purpose* to controvene this common law principle, and super-

sede this statutory provision as respects this action. *It is possible* to reconcile the two acts. It may well be that the legislature intended to vest the title restrospectively for the purpose of giving effect to mesne conveyances and prosecuting frauds without intending also to throw the burden of the costs of an action of ejectment, then pending, upon a defendant, who, as the law and the facts were at the commencement of the action, must have been the successful party. *A stronger case than this must be presented to induce us to sanction such a result by our judgment.*"

"All corporate powers" which it is declared shall be exercised by the commissioners, in the law of April 15, shall not include the "levy of a tax," which, by a law of April 10, they are forbidden to exercise without the consent of the County Board.

Brown *v.* County Coms., 21 Penn., 43.

"Subscriptions of stock in any railway company" prohibited by an act of March 3, '51, shall not include "subscriptions of stock in Ohio & Mississippi R. R. Co.," which are permitted by an act of March 1, '51.

City of St. Louis *v.* Alexander, 23 Mo., 570.

"Power to license insurance companies" given a city by its charter, shall not include power to fix rate of license for foreign insurance companies, which is fixed by an earlier and special law on that subject.

St. Louis *v.* Mass. Ins. Co., 47 Mo., 149.

"Application and proof of pre-emption," which it was provided shall be made within twelve months in a law of

'63, shall not include "pre-emption of one Maillet" specially authorized by a prior law.

Bondin et al *v.* Barbin, 13 La. Ann., 40.

"No person or corporation" shall take a greater rate of interest than six per cent., which is declared in the Revised Act shall not include the "State banks," for which the rate of interest was fixed by earlier special statutes of the same session.

M'Farland *v.* The State Bank, 4 Ark., 412.

"All fines for licenses" which it is provided shall be paid to the county treasurer by a general law of 1839, shall not include the "fines for licenses" which the town of Ottawa shall collect under provision of its charter of 1837.

Ottawa *v.* LaSalle Co., 12 Ill., 341.

"The property of the county" upon which, by terms of a law of '65, the Board of Supervisors were authorized to collect taxes by a law of '65 does not include property in the city of Macomb, which is exempted from all county taxes by a special law of '57.

Board *v.* Campbell, 42 Ill., 491.

"All real estate of a collector" upon which it is declared that his bond shall be a lien by town or state; act of 17th February, '51, shall not include the homestead of the collector, which was exempted from debts by the Homestead Law of February 11, '51.

Hume *v.* Gossett, 43 Ill., 299.

"The State tax" which was appropriated to help build levees in American bottom by a law of '67, shall not

include the "two mill tax" which has been otherwise appropriated by a prior law.

People *v.* Miner, 46 Ill., 384.

The special power to levy a tax to build bridges given in general words to the Board of Supervisors of Cumberland county, by an act of '67, was held to be restrained by the provisions of the statute of '61 upon Township Organization, which requires two-thirds of the Board to levy such tax. Because the special words—the restriction upon this specific power—although in the general law for all counties, controlled the general words, although in a special as well as subsequent law for Cumberland county.

Cumberland Co. *v.* Webster. 53 Ill., 141.

The words, "any railroad company," and "any county," used in an act of '65-'66, making it lawful for any county to take stock in any railroad company, provided two-thirds of the people assent at election, were held not to include "Macon county," nor the "Ohio & Mississippi Railroad Company;" because, by a prior law, of '65, *naming said Railroad Company*, said Company was given the power to contract its stock to municipal corporations, without such an election. In short, the special charter of the Company was held to be untouched by the general law.

State ex rel. *v.* Macon Co., 41 Mo., 453.

General legislation on a particular subject must give way to inconsistent special legislation.

Dillon, Sec. 54, and note 5, and cases cited.

A general law forbidding the opening of a street through cemeteries, is not repealed by a subsequent act extending the limits of a town, and appointing commissioners with authority to "survey, lay out streets and alleys, as they shall deem necessary, within said limits," since both acts can stand, and repeals by implication are not favored.

Egypt Street, 2 Grant Pa. Cas., 455.
Dillon, Sec. 53.

So a general act specially prohibiting a corporation from restraining citizens from selling at wholesale in the city market is not repealed by implication, by a subsequent act, by which the city authorities are invested with power to pass such ordinances as appear to them necessary for the security, welfare, etc., of the city.

Haywood *v.* Savannah, 12 Geo., 404.

So, also, a State license required as well as city license by auctioneer.

Sampson *v.* Savage, 1 Mo., 359.

See also the following recent cases of the National Supreme Court, which are also directly in point:

South Carolina ex rel. *v.* Treasurer of Charleston Co. Legal News, Dec. 13, 1873, where it is held that "the special authority must control the particular case."
Also State *v.* Stoll, 17 Wall., 425.
Ex parte Atoeha, 439 Id.

The learned counsel also cite, in every brief printed on these questions (see p. 19 orig. arg.; p. 55 on re-hear-

ing), as a direct authority for the bondholders, the case of Robertson *v.* the City of Rockford, 21 Ills., 451. We beg to say that this also, seems to us a case of the application of the very rule of construction we are contending for, although there is a distinction in the fact that the special language which controlled, was found in the later act. In that case the charter of the city of Rockford, of 1854, forbade the city borrow money, exceeding a sum to be ascertained, in a way therein prescribed. Now, on Jan. 25, 1856. an act was passed incorporating the Kenosha and Rockford R. R., providing for subscription to its stock, by the counties, cities or towns on its line; and it was held that the provision in the charter of the road which, in that case, was not only special in its language, but was also later in its date, should control the subscription to that company, for which it provided.

A special statute is not modified or controlled by a subsequent general statute on the same subject, unless the latter clearly manifest such an intention.

Mobile and Ohio R. R. *v.* State, 29 Ala., 573.

A special statute, confering on a particular bank a summary remedy for the collection of its debts, is not repealed or affected by a subsequent general law, unless the latter act clearly manifests on its face such intention.

Pearce *v.* Bank of Mobile, 33 Ala., 293.

The case of Fosdick *v.* Perrysburgh, 14 Ohio, 472, is also cited in extenso in the same brief, as if it supported the construction required by the plaintiffs; but unless we are unable to understand it, it is a case in which the courts

have followed the plain rule, that the general language of one part of the statute, must yield to the special language of another, wherever sound policy, or just reason, or public interests shall require it; *e. g.*, the special powers conferred upon the Dayton R. R. Co. in its charter providing that Perrysburgh might subscribe certain limited amounts of stock, with the rights, and subject to the restrictions of an act known as the Clark County Act. Now these powers were held not to be repealed by the general language of a subsequent act, providing for the organization of towns and cities, that "for the purpose of paying interest on the public debt" of such municipal corporations, the council of "*any town*," etc., shall have the power to levy and collect a tax not exceeding 6 mills on the dollar; but that the taxes to pay the bonds might be collected according to the law under which they were specially authorized.

The court concludes by quoting fuom Sedgwick the following passage, which contains an admirable statement of the law, and the philosophy and reason of it, as follows:

"In Sedgwick on Statutory Law, 123, it is said: 'In regard to the mode in which laws may be repealed by subsequent legislation, it is laid down as a rule, that a general statute without negative words will not repeal the particular provisions of a former one, unless the acts are irreconcilably inconsistent.' He continues: 'The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in

general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, *in order that its words shall have any meaning at all.*

The Language of the Laws of March 4th and 26th are Special in the Sense of this Rule.

This general language, which the courts deal with so freely, is as a rule used in general statutes which relate to a number or a class of corporations; and the particular language which controls it is, as a rule, used in a statutes specially relating to one corporation or one subject matter.

1st. They Confer Power upon a Single R. R. Corporation, while the other Act Confers it upon Many.

It will be seen that this rule holds good in the case of these statutes; the acts of March 4 and March 26 confer power upon a single railroad corporation, to wit: this company to contract its stock with the municipalities through which its line runs, to wit: amongst others the eight counties named in the act of March 25, and their inferior municipalities.

The act of March 25 confers power upon "any company" organized, or to be organized, "which passes" through the same counties, or either of them, to contract its stock to some counties, whose names are then given, in

the order in which they lie along the line of this company.

2ND. EVEN AS TO MUNICIPALITIES THEY ARE NEARLY AS SPECIAL.

And looking at the other contracting parties, the acts of March 4th and 26th confer power upon the same counties and their inferior municipal corporations; and the act of March 25 also confers power upon the same counties and a part of their inferior corporations. The law of March 25 is not a law special to any one corporation, but embrace seventy or more; it is definite and special in its language only as to the counties, and that from necessity, for, as it names nothing else, it was necessary to name something to make a local law at all.

Now these words, to-wit, the eight counties named, and their towns under township organization, in themselves are general as well as somewhat special, for they mean some seventy or eighty municipalities, of which but eight are named; and embracing so many, it is in this particular scarcely more special, even here, than the law of March 4, which sweeps them all in by a less number of phrases. This is certain, that it is not special in the sense of the other acts, which on one side are confined to one corporation, which we know the legislation is meant specially for. We concede that these words, the names of the counties, are special, but insist that in the sense and reason of the law, they partake in the lowest degree of that element, because of their number. But conceding all that can be claimed, that these words are special, and that so far this act has the advantage.

3d. They are Special as to Amount, and as to Notice of Election; as to the really Important Matters.

On the other hand, as pointed out, the other acts are also special, and this no one can deny, as they name but one single corporation, as they are in respect to amount, to the election, to the notice, in the fullest degree special, within the rule giving the preference to special words; while, on the other hand, look at every other word in the act of March 25, relating to the important particulars in question, we mean the corporations and the amount; and the generality is the widest possible;—not all the companies "*which shall pass through either*" of the said counties and towns, but all "organized or to be organized;" not a limited amount of stock, but "such an amount" as any of such counties or towns shall deem proper. Generality in these particulars could go no further; the language is not alone general; it is so general, as to deserve to be called indefinite.

The important matter, too, is the Railroad corporation; for different reasons should, may—nay must—control contracts with corporations, so numerous, and some not in being; and in the amount to be taken, and the amount of notice, which are equally important; in every one of these matters, our acts have the advantage, and come under the rule. They are, too, precisely on all-fours as to the facts with many of the cases cited; and, at most, our opponents could only set up for their act inferior claims, to control in respect to the municipalities named in their act, while compelled to give way, as to the corpo-

ration with whom they should contract, the amount, and the notice.

4TH. AS TO MUNICIPALITIES NO ROOM FOR DOUBT; THE ACTS ARE IN THE USUAL FORM.

Now, as to these municipalities along the line of this Company, as a question of intention, who doubts they were meant by these several acts providing for its corporate subscriptions? They are described in the usual way in such acts, and the acts are in the usual form, amendments to the charter of the Railroad Company; while, on the other hand, for reasons that are no credit to the act of March 25, as elsewhere pointed out, it takes the unusual form of an independent grant of power to seventy municipalities to subscribe to companies, born and unborn; and, at the same time, we see that the counties are not neighbors, but form in single file, a curving column, extending from Rock Island nearly to St. Louis, on the very route pursued by this Road; and, in a moment, we lose our faith in an act which is seen, for some unhallowed purpose, to disguise or mask its real purposes.

5TH. THE ACT OF MARCH 25 IS IN DISGUISE, AND IS THE FURTHEST POSSIBLE FROM SPECIAL IN THE SENSE OF THIS RULE.

Certainly such an act is the furthest possible from "special," in the sense of this wholesome rule, which is meant to find the intention of the legislature in the special words which speak their mind. This act cannot be said to place its purposes in the white light of truth, but rather, conceals them from view, like a masked battery. We know it does not mean what it

says; it was never meant for any other companies than this, and yet does not, in plain terms, say so. It stole through the legislature in this well-contrived disguise. Let this disguise be as effectual now; let not the Court be astute to lift it; to look for legislative will, where there is not a spark of it; let it wear its leaden mask still, like Dante's hypocrites!

TEST THIS CONSTRUCTION BY THE ANCIENT RULE "THAT THE PARTS MUST BE SO CONSTRUED THAT THE WHOLE MAY, IF POSSIBLE, STAND.

Another rule of interpretation of due affinity is, that the parts must be so construed that the whole may, if possible, stand; ut res magis valeat, quam pereat. A construction which renders a part of a statute nugatory is rejected as void, and should not be given.

These laws are framed upon one system, and having one object in view.

So the statutes concerning leases, 32 H. 8, c. 28; 1 Eliz., c. 19; 13 Eliz., c. 10, do not recite or refer to each other, yet all are to be taken into consideration in the construction of any one of them; yet a lease is not warranted by either of these statutes unless it have the qualifications referred to by 32 H. 8, c. 28.

To give this law of March 25th control over the powers of this company, to contract its stock with these municipalities, leaves the acts of March 4th and 26th, with their occupation gone.

THE ACT OF MARCH 4TH CONTROLS THAT OF MARCH 25TH AS TO "AMOUNT" OF SUBSCRIPTION, BECAUSE THE WORDS "NOT EXCEEDING" $100,000 ARE NEGATIVE WORDS, IN THE SENSE OF THE CANON WHICH DECLARES THAT SUCH WORDS CONTROL AFFIRMATIVE WORDS.

Again, another rule of construction is that negative words, negative clauses, and negative statutes, control affirmative statutes.

Dwarris, 610, 711.

The language of the acts of March 4 and 26, "not exceeding," are negative in this sense. They are words of restraint and of limitation, and are more powerful than mere affirmative words, because, in the point negatived or limited, "the mind of the legislator is shown to have touched the very matter in hand." These words, "may subscribe not exceeding $100,000," import that it shall be unlawful to subscribe more—they mean "and no more."

In Dr. Foster's case the negative words wanting were "and not in any other court and before any other judge," so that the stat. of Westminister giving power to certain judges, had it contained these words, would have excluded other judges.

Dwarris, p. 743.

So the words of 23 Hen. 8, Ch. 3, all attaints hereafter to be taken to the King's Bench, "and in none other courts." (Id. 2. Inst. 62.)

So the statute 6 E. 6, that the quarter sessions should always be held at B. only, "and not elsewhere."

All these were held negative words; and are they more negative than the words "not exceeding?" It is respectfully submitted that, under this rule, the amount fixed in these acts of March 4 and 26 must control the affirmative language, to wit: "such an amount" as the county shall deem proper, of the Act of March 25.

Test this Construction by the Rule that the Judges Should Make such Construction as shall Suppress the Mischief, etc.

Again, it is held to be the duty of the judges "to make such construction as shall suppress the mischief and advance the remedy, putting down all subtle inventions and evasions for continuance of the mischief, *et pro privato commodo*, and adding force and life to the cure and remedy according to the true intent of the makers of the act, *pro bono publico*.

Heydon's Case, 3 Rep., 7.
Dwarris, 562, 553.

Where other means fail, and it remains doubtful what the legislature meant, resort is had to the spirit and policy of the law, it being presumed that the legislature meant to advance the public interests.

It is laid down (Hobart, 107): "Laws are made for the advancement and benefit of the public, and must receive as strong an interpretation for the attainment of that end as possible."

Dwarris, 515, 556, 569, 570, 574, 577 and 582.

Policy of our Laws touching such Subscription has been a Policy of Limited Permissions coupled with Just Restraints.

Now, the spirit and policy of our laws touching municipal subscriptions to railroad corporations has always been a policy of limited permission coupled with just restraints and regulations. The general law of 1849 illustrates this, for it allows a subscription not exceeding $100,000, on the terms that at an election after thirty days' notice, a majority of all the voters shall vote for it.

Touching this railroad, the policy of the legislature has been fully expressed. In 1865 it was chartered, but was left to contract with the counties under the restrictions of the general law.

This Policy distinctly expressed as to this Company.

The legislature of 1869 adhered to this policy, and amending the charter of '65 in section 6 of the act of March 4, expressly imposed the restrictions of the law of '49 as to the amount of subscription, but required that the notice for the election should be published in a newspaper, as well as posted, during the period of thirty days. And on March 26 the same legislature increased their restrictions by limiting the aggregate subscriptions of the county and its inferior municipal corporations to $3,000 per mile, and then declaring that no subscription should be made unless a majority of the voters voted for it at an election of which the full notice of thirty days required by the law of March 4 should be given.

Here is a distinct and unequivocal policy pointed out

by a series of laws, in accordance with public interests and that sound policy which always jealously guards the debt-creating power.

Act of March 25 sandwiched in to defeat the Legislative Will.

In the face of this, is it just that this court should give a construction to the law of March 25, which imputes to the legislative department such neglect or contempt of public interests as to trample upon and abandon this policy, to throw wide open the doors of taxation; or, if you please, a construction which carries with it a taint or reflection upon that department that, without knowing it, they have by this law undone all, they have clearly said by other laws they meant to enact?

It is evident enough that the law of March 25 was sandwiched in by some designing knave, and pushed through the legislature in some omnibus to defeat the wholesome restrictions the legislature meant to impose by the laws of March 4 and 26. To defeat such an attempt by a monopoly under the cover of an act in which it is not named, to get rid of the salutary restrictions imposed by the legislature upon this road by name, is it not the plain duty of a court?

Rules for the construction of statutes were intended to protect the public against such knavery. Construction is only required in cases where the "plain letter of the law" would lead to mischief evidently not meant to be suffered by the law-makers. To ask this court, in defiance of the established rules of construction, to follow the general

words of the act of March 25th, because the 25th is later than the 4th, is to ask the court to play into the hands of the corporation. Hundreds of cases can be cited where the "plain letter of the statute" was overruled so as to check monopolies or private greed, or to preserve and advance public interests and public policy.

These acts of March 4th and 26th, while conferring a moderate and reasonable power on municipalities to aid in the construction of local roads, were also intended to suppress the public mischief of indiscriminate subsidies to this road, and by increasing restrictions, to save the public from taking upon them too great a load of debt; and this was in obedience to a public sentiment that has since culminated in the constitutional prohibition. Let them be construed so as to suppress this mischief and advance the remedy.

AUTHORITIES FOR SUCH CONSTRUCTION AS SHALL SUPPRESS THE MISCHIEF.

In the case of Phillips *v.* The State, 15 Geo., 521, where the law in terms declared that in all cases where a levy was made, the property should be turned over to the claimant on his giving bond, the court held that the officer was only bound to do so, in cases where the claimant was found in possession, saying "the generality of the phrase ("all") is frequently to be restrained in an act, not only by the context, but by the general form and scheme of the statute as demonstrative of the intention of the legislature. Here it means in all cases where the claimant is in possession he shall not be deprived of it, but it shall be left with him. If the words of an act are

doubtful, the construction should be given to it which would best subserve the purposes of right and justice."

This is the doctrine laid down in Dwarris, p. 120:

"That the charters, established with such purity, wisdom, and universal consent of the whole realm, for the advancement of the commonwealth, ought not, by any constrained construction put on the general and ambiguous words of a subsequent act, to be abrogated. But statutes of this kind, so solemnly and prudently made, ought to be maintained and supported with a benign and favorable construction."

So where a statute enacts that all the lands and tenements of one attainted in a premunire shall be forfeited to the king, the case (in Pasch. 21 Eliz.) was that one Trussin, being tenant in tail of certain lands and tenements, was attainted in a premunire, and the question before all the judges of England was, if the estate tail was barred or not; and it was upheld by all the judges, that these general words had not repealed the statute of de donis conditionibus, but that he should forfeit only for his life, and the issue in tail should inherit (Id. 120).

So where, in an action for a penalty, the defendant had paid the duties under a new act, discharging the penalty on such payment by a given day, Lord Mansfield said: "Here is a right vested, and it is not to be imagined that the legislature could, by general words, take it away. They certainly meant future actions."

Dwarris, 682, 4 Burr., 2400.

"It matters not that the terms used by the legislature in

delivering its commands, are not the most apt to express its meaning, provided the object be plain and intelligible and expressed with sufficient distinctness to enable the judge *to collect it from any part of the act.* The object once understood, judges are so to construe an act as to suppress the mischief or advance the remedy.

"A remedial statute ought to be construed liberally, and the words sometimes enlarged, sometimes restrained, to prevent a failure of the remedy.

"Like the case of an infant or a madman, or any other like case, the contracts with whom are construed out of the purview of the statute; because, out of the mischief intended to be remedied by it, they are out of its meaning.

"Such a construction would create a solecism in the law, so that the external words should be narrowed to arrive at that point which is the object of all laws—the attainment of justice." (Id. 727.)

Accordingly, *it is a rule* that such exposition of a statute is to be found as hinders the statute from being eluded.

The case of Cator *v.* Lewisham, 5 B. & S., 136, turned upon a question of the construction of a statute, by which it was claimed that the defendant had the right, to pollute with sewage a stream running through the plaintiff's lands, which might result, as the court said, in the total annihilation of the value of the adjoining land for building purposes, etc.

A leading ground for deciding against this construction was, that it was to be expected "that such a power

as this, if conferred, would, at least be given by express words."

SUCH A POWER OF UNLIMITED SUBSRIPTION, IF GIVEN, WOULD AT LEAST BE GIVEN BY EXPRESS WORDS.

This ground for decision exists in this case against the construction claimed for the act of March 25th. If a new policy was to be originated, a complete innovation in respect to the powers certainly of this company to take municipal subscriptions, a power to which such consequences are attached that the property of a community can be loaded down with indebtedness to any amount the majority may be persuaded to take; or, to put it more accurately, (with a view to the doctrine of apparent authority), to any amount the county officers choose to issue; it is strange, indeed, that the legislature, if they intended to give this power, did not confer it in express terms, and declare a repeal of the act with which it, thus construed, is in conflict. This argument gets great additional force, from the fact that the legislature are found at the very same time busy in denying this very power to most, if not to all, the same municipalities; and this is stated in express and unmistakable terms by the act of March 26.

In Attorney-General *v.* Leeds, 39 Law Jour., 711, a similar question was before the court, viz: Should the powers specially given to Leeds to build a sewer, by an act which conferred the power in unqualified terms, release that city from the requirements of the law relating to sewers? The court held that the city must accept its power subject to the restraints imposed by the latter

law. Could they create a nuisance? No; and by analogy they are bound not to interfere with public right.

In O'Conner *v.* Warren, an amendment to the Mechanic's lien of Pa. was construed against its letter in accordance with the spirit and policy exhibited in the other laws of the State on that subject. Gibson, C. J., delivering the opinion, said:

"Our legislation for almost forty years breathed one uniform spirit of kindness to the operative; and it was not without our special wonder that we saw it, in 1840, breathed a hostile one. * * * It is supposed, however, that the dayspring of 1840 revealed its moral deformity, and taught the legislature to shift the burthen of its injustice from the shoulders of the innocent reversioner or remainderman, to those of the more innocent purchaser, who had paid his money on the faith of laws constitutionally enacted and expounded.

"*No man can assent to a proposition so monstrous; yet it might be inferred from the literal import of the words that such was the design; and it shows the dangerous tendency of legislation so hurried as to produce statutes which are a surprise to those who have made them.* The statute of 1840, even in its prospective operation, goes far to sap the foundation of the mechanic's protection; and *we cannot think the legislature was apprised of the drift of the section, when it struck the blow at interests so long and anxiously cherished.* * * * * In the case before us, we are firmly convinced that the legislature did not

design to deprive purchasers of their titles acquired under the original act; but *whatever the design* we are *bound to give the section a benign interpretation.*"

O'Connor *v.* Warren, 4 W. and S. 227.

So the words, "officers of the army who have brevet commissions," in the act of Congress of 1818, regulating the pay and emoluments of brevet officers, and limiting it to the same "when on duty," having a command equal to their brevet rank, were intended, from their connection with the subject matter of the act, though they are descriptive of a particular class, to comprehend all officers of the military establishment of the United States, who, when the act was passed, were only, under like circumstance, entitled to brevet pay and emoluments; and, hence, includes the officers of the marine corps; and, hence, repeals the 3d section of the act of 1814, which provides specially that "officers of the marine corps" shall have brevet pay "when breveted officers commanding separate stations or detachments."

This conclusion is reached from a careful examination of all the acts of Congress relating to the pay and emoluments of brevet officers, including the act of 1812, by which the court finds that notwithstanding there had been a contrary erroneous practice under these laws of long standing, "that the brevet officers of the marine corps, have always been, by law, upon the same footing with other officers of the military establishment of the United States, in respect to pay," etc. The court say, the erroneous practice in the construction of the act of 1818 arose from that act having been considered by

itself, without any reference to other statutes relating to brevet commissions, pay, etc.

The words "each and every statute" in the act of Congress of July, '66, by which a bounty is given "to each and every soldier who enlisted after April 14, 1861, for a period of not less than two years," do not include a soldier who enlisted for three years, served for two years, and was then discharged by reason of having received an appointment in the executive department, because to so construe the law is against the policy of the bounty act.

Philbrook *vs.* U. S., 8 C. Cls. R., p. 523.

According to principles of construction which are applied to all statutes, the general words of the act are not to be so construed as to alter the previous policy of the law, unless no sense or meaning can be applied to the words consistently with the intention of preserving the existing policy unrestricted.

Minet *v.* Leman, 20 Beav., 100.

So the words "any tax" in a law of '56 declaring that every railroad company on paying a fixed State tax shall not be assessed with "any tax," were held not to include a city tax imposed by the city of Alexandria by virtue of its charter. The court, after saying it would be unjust for the State to purchase compliance with a new system of taxation on the part of the railroad companies at the expense of the other taxpayers in the cities, holds that the legislature did not intend to exempt the companies from city taxation; saying: "This intention must prevail over the more literal sense of the words, and the more so since the words in this case are not explicit, and

in order to give effect to their intention it is not necessary to contradict their plain meaning, but only necessary to limit the scope which they would have or might have upon a strictly literal interpretation." Vide 1 Kent's Com., 462: Dwarris, 818–726; United *v.* Freeman, 3 How. U. S. R., 556; Phil., Wil. & Balt. R. R. Co. *v.* Bayless, 2 Gils. R., 355; Mazor *v.* Root, 8 Maryland R., 95; Orange & Alex. R. R. Co. *v.* Alexandria, 17 Grattan, 183.

THIS ACT OF MARCH 25TH IS TO BE STRICTLY CONSTRUED, BECAUSE IT CONFERS POWER UPON A R. R. CORPORATION. IT IS AMBIGUOUS WHEN CONSIDERED ALONE; AND WORSE WHEN CONSIDERED WITH THE OTHER ACTS.

Again, these several acts confer power upon a corporation; and the rule is that any ambiguity in the terms of the contract (*i. e.*, the statute) must operate against the adventurers and in favor of the public. "They who enter in such cases must clearly show their authority; and if the words of the statute on which they *rely be ambiguous, every presumption is to be made against the company* and in favor of private property." *If such a construction were not adopted acts would be framed ambiguously in order to lull parties into security.*

Scales *v.* Pickering, 4 Bing., 452.
Carver *v.* Marietta R. R. Co., 11 Ohio St., 231.
Pittsburgh, etc. R. R. Co. *v.* Alleghany Co., 63 Pa., 141.

The Commonwealth *v.* Central Pass. R. R. Co., 52 Pa., 516 was a case much like this. The railway, there as here, claimed that they had been relieved of a useful restriction, and the question was whether a prohibition

in another statute did not impose it. The court answer this question in the affirmative, and after laying down the rule as above that all doubts must be resolved against the corporation, the court comment on the *magnitude* of the franchise claimed, and on the fact that it seriously affects the rights and conveniences of a large community, and declare this to be a double reason for *requiring a grant in language that has no ambiguity.* They declare that it is the duty of the court "to presume that the legislature *have not exercised this power until the contrary is shown in unmistakable language.*

"The Acts of Assembly under which they claim, and which it ought to presume were adopted by them, *are most unprecedentedly obscure.* They are inexcusably so. IT IS DIFFICULT TO AVOID A SUSPICION THAT THEY WERE THUS ADOPTED FOR A PURPOSE. Some of the most important privileges claimed under them, those in which the public are most deeply interested, if granted at all, *were given in the most incautious and indirect manner, in language not usual where similar privileges have been granted by the legislature. The defendants, therefore, have no cause to complain if every intendment not absolutely unfounded be made against them.*

"The defendants must show a clear and indubitable right to every franchise which they claim. * * Grant of power by such language is unreasonable and it is dangerous.

"IT ENABLES ADVENTURERS TO SECURE RIGHTS WHICH THE PUBLIC MAY NEVER HAVE INTENDED TO GIVE, AND WHICH WOULD HAVE BEEN REFUSED HAD THE GRANT BEEN CLOTHED IN APPROPRIATE LANGUAGE. Those, therefore, who claim

under such grants have no right to complain if they are held to the strictest certainty in every particular."

Is there a single line of this which is not, in every particular, applicable to the case at bar, and with tenfold emphasis. Here the "*ambiguity*" is on the very face of their own law—the act of March 25th. We cannot see that it has any application to this company till we find it stealing in under the description of one of the roads passing through the counties born and unborn! Too modest by half, and too well concealed for the court to uncover it. Here is a latent ambiguity on the very face of their title, looking at the only clause of the statute which gives any color of right to their subscription.

But when we look at all the case—at their own charter and the amendments—we find fresh questions of construction raised by a half dozen of statutes passed at the same session, giving different and inconsistent powers. We find, too, just as in the case just cited, unusual and boundless powers granted, "in the most incautious and indirect manner, if granted at all." We need not say, in this case, we suspect, for we have proved that these obscurities were "adopted for a purpose"—that the legislature "would have refused the grant had it been clothed in appropriate language."

Who could fail at least to doubt whether the legislature meant to grant these powers, when they are claiming, as you see by the laws of March 4th and 26th, that they never meant it? And yet to doubt, in the language of this same court, in the language of the law, is to decide against the power and for the people!

THIS POWER, OF, IY YOU PLEASE, THE ACT OF MARCH 25TH, IS TO BE STRICTLY CONSTRUED, BECAUSE IT IS A DEBT-CREATING POWER CONFERRED UPON A MUNICIPAL CORPORATION.

Again, the powers of municipal corporations to create debt, are also to be strictly construed.

Dwarris' Stat., 648, 651.
Hammersmth *v.* Brand, L. R., 4 H. L.. 171.
Atty. Genl. *v.* Leeds, 39 L. J., 711.
Metropolitan Bk. *v.* Godfry, 23 Ill., 602.
Chicago *e.* Rumpff, 45 Ill., 96.
Miller *v.* St. Clair, 2 Gill., 235.
People ex rel. *v.* Chicago, 51 Ill., 35.
City of East St. Louis *v.* St. John, 47 Ill., 467.

Acts, in order to infringe upon the legal rights of the subject, and especially to impose a tax, must be expressed in language clear beyond all reasonable doubt.

Shaw *v.* Ruddin, 9 Ir. C. L. R., 214.
S. P. Reg. *v.* Mallen Union, 12 Ir. R. C. L. R., 35, (Q. B.)

If an act is capable of a construction so as to relieve and not impose a burden upon the subjects of the realm, it is to be so construed, if said construction be reasonable and will effect the real object of the act.

Hibernian Mine Co. *v.* Tuke, 8 Ir. C. L. R., 321 (Q. B.)

"Every charge upon the subject must be expressed by clear and unambiguous language.

" Where the public are to be charged with a burden, the

intention of the legislature to impose that burden, must be explicitly and distinctly shown."

Dwarris, p. 749.

"A power derogatory to private property, must be construed strictly, and not enlarged by intendment. Private acts of Parliament conferring new and extraordinary power of a special nature upon particular persons, affecting the property of individuals, or giving exemption from a general burden attaching by law upon all parties, should receive a strict interpretation. Every presumption is to be made against the company, and in favor of private property."

Dwarris, 750, and notes c, d, and cases cited.

"If, upon the whole, there be fair, reasonable and substantial doubt whether the legislature intended to confer the authority in question, particularly if it relates to a matter extra municipal or unusual in its nature, and the exercise of which will be attended with taxes, tolls, assessments or burdens upon the inhabitants, or oppress them, or abridge natural or common right, the doubt should be resolved in favor of the citizen and against the municipality."

Dillon, Sec. 55, note 5.

Fresh reasons for this are found by Hitchcock, Judge, "considering with how little care chartered privileges are in these days granted."

Bank *v.* Chillicothe, 7 Ohio, 223.

The security against this danger, of depriving a citizen of his most valuable personal rights and liberties, is in a

steady adherence to the principle stated; viz., that corporations can only exercise their powers over their respective members for the accomplishment of limited and defined objects—"no powers save those conferred upon the corporation by the act by which they are constituted."

Shaw, C. J., 23 Pick., 71. Spaulding *v.* Lowell.
Dillon, Sec. 55.

Laws conferring the power of taxation upon a municipal corporation are to be construed strictly.

City of Richmond *v.* Daniel, 14 Gratt., 387.
Orange & Alex. R. R. Co. *v.* Alexandria, 17. Gratt., 184.

In Chicago *v.* Rumpff, it was contended that an amendment to the city charter confirmed a contract which created a monopoly; the words being that "the common council * * shall have power to enforce * * any contract * * heretofore made on this subject;" but the Supreme Court refused to give effect to this law, saying: "*inasmuch as this contract is not specifically named*, we cannot presume that the legislature intended to ratify an unreasonable and offensive contract, *but only such as was in accordance with the purposes for which the charter has been granted, and not those which were opposed to the design of creating such bodies.*"

AS AN INNOVATION, AS WELL AS A POWER CLAIMED BY CORPORATIONS, THE LAW OF MARCH 25TH IS TO BE STRICTLY CONSTRUED.

On the other hand the very same principle forbids a liberal construction of the act of March 25, and, on an

independent ground, calls for a strict construction. It is a "deviation from an ancient constitution"—from a rule of sound policy imposing limitations on the debt creating power. Its words in their literal import lead to absurd consequences, to inconvenience, to results against reason, and this is a ground against the interpretation desired by our opponents.

Dwarris, p. 750, 1st Ed.

THE CONSTRUCTION CLAIMED BY OUR OPPONENTS LEADS TO ABSURD CONSEQUENCES, WHICH PROVE IT UNSOUND.

Note for a moment the inconsistencies required by our opponents' construction of this act.

The General Railroad Law of '49 applies the same policy to cities and counties. The laws of March 4 and 26 apply the same policy.

But the law of March 25 singles out a part of them to wit, some eight counties and towns under township organization, to confer unlimited powers upon them.

Then the law of March 26 comes in and strikes down these powers again, and applies the policy of restriction —to all municipalities — to all but counties under township organization say our opponents! Here are a series of arbitrary distinctions, between communities whose interests have ever been regarded as alike, made, and made only, by the construction claimed by our opponents of the general words of the law of March 25.

NOTE THE GROSS INCONSISTENCY OF HOLDING THAT THIS LAW OF MARCH 25 GIVES SCOTT & COUNTY UNLIMITED POWER, WHILE TWO LAWS NAMING SCOTT COUNTY, AND THIS VERY COMPANY LIMIT THAT POWER FIRST TO $100,000 AND NEXT TO $50,000.

Again Scott county is a county named in this act, and which our opponents say the legislature meant might take any sum it choose in this company—no restriction left! Now on pp. 366 and 367 of Vol. 3, Private Laws of '69, will be found two acts which tell a very different story, to wit: one in force January 23, '69, and one March 25, '69; the first authorizing the county of Scott to subscribe to the stock of this company any sum not exceeding $100,000, after an election at which a majority voting shall vote for subscription, and the proceedings to be according to general railroad law; the second amending and reciting in a preamble the first act, and then declaring an election in Scott county held before the law had passed, valid, and conferred power upon the county court; and making it the duty of said court to subscribe $50,000 stock in said company.

How is it that the legislature on January 23, '69 authorized Scott county to take not exceeding $100,000 stock in the Rockford, Rock Island & St. Louis Railroad Company, and on March 25, '69 amended this law and directed and confirmed their subscription of $50,000 to be made under it, if the legislature on that day had repealed those laws by implication, or, to use the euphuism adopted to cover this condemned and abandoned position of our opponents, by the cumulative power of the act of March 25?

How is it that the legislature on January 23, '69, told Scott county to take what stock it pleased, but not exeeeding $100,000 stock in this company, and on March 25, '69 told that county to take what stock it pleased in the same company? And how is it that at the same time the legislatnre had recognized this act of Jan. 23d to be in force Mar. 25, although it was repealed by the act of Mar. 25, and directed that Scott county might take, and ordered them to take but $50,000 stock therein? Why, of course, the legislature did not know what they were doing!

Do not these special and limited powers show that the legislature constantly adhered to a consistent and wholesome policy of limitation and restriction of the debt creating power, given to these county officers?

HAD THE LEGISLATURE MEANT TO CREATE SO GREAT AN INNOVATION THEY WOULD HAVE DECLARED THIS INTENTION, IN UNMISTAKABLE TERMS.

We must presume these matters—the powers of this company to deal with these municipalities on its line—were under discussion in March, '69—and at the same time—as our Constitution tells the legislature to read the laws of Mar. 25th and 26th on three different days. "It is, therefore," to use the argument of Lord Chancellor Eldon in a similar case (Ex parte Burgess, etc., 2 Glyn & Jameson, 199), "*a reasonable presumption*" that if the legislature had, at any moment, intended to confer these general and unlimited powers, they "would have said so by a clear and distinct enactment, instead of such vague and general words." "It could not, therefore, have

been the intention of the legislature to introduce such a great innovation, by such a scanty and obscure description."

ON THE CONTRARY, THE OBJECT OF THE LEGISLATURE WAS TO PROTECT THE PEOPLE AGAINST THIS VERY POWER.

For the people are unable to protect themselves, as we know, against the fascinations of the power of creating such debts, and of dealing with the adventurers, who are ready to prey upon them. This has always been the policy of this State, its laws rightly interpreted; it is a restraint put upon the legislature themselves in the Constitution. "So sensibly impressed," says Ch. J., Breese, in People *v.* Chicago, "were the framers of our Constitution of the liability of legislative bodies to incur debts —sometimes for objects not entirely praiseworthy or useful, and the hazards, losses and disturbances to which they lead—that they interposed the power of the people at the very threshold to prevent this danger—to tie up the hands of the legislature on this subject—to divest it of a power which dear-bought experience has satisfied the people should not be left unrestrained."

MARROW AND GIST OF THE ACTS OF MARCH 4 AND 26, CONSISTED IN THEIR RESTRICTIONS.

The very marrow and gist of the laws of March 4th and 26th consisted in the grant of these powers, under just restraints; *widening simply the number of municipalities who could take part in aiding the road*, so as to distribute the debt over those who wanted to make it, and leave their powers to those who did not wish to give it away in

such shares—conferring upon the inferior municipalities of the county the power to take a share of the $100,000 aid, which the general railroad law had given the county the power to take.

The object of the law of March 26th was to prevent double subscriptions, and to fix restraints upon an ambitious town, so that they could take no more than a given amount per capita.

The law of March 25 steals in and destroys this carefully-devised and cherished policy of the State. It never mentions this company; it confers powers upon municipalities who were not acting for them to subscribe in companies not acting for it, and even in companies unborn. Who cannot see that this was a disguise? And who does not believe that it was adopted for the very purpose of enabling this very company, who alone ask its benefits, who alone were seeking subscriptions in these counties, to escape from the restrictions being put upon it, by name, in acts that express the legislative will?

In the Commonwealth *v.* Central Pass. R. R. Co., above cited, the court use this very argument, applied in a case infinitely less strong; for the policy of which they speak was not found, as it is here, in the law of the very company under consideration.

The court say: "Nor can we lose sight of the fact that in very many cases—nearly all, indeed—in which charters have been granted to passenger railways in the city, the grantees have been required to obtain the con-

sent of the city council, prior to their taking possession of streets along the line of their authorized routes.

"We would naturally expect to find such a requirement in the charter of defendants, and when we find a clause that may bear such a construction, the legislative policy, exhibited by the usage in other cases, is a reasonable guide to the meaning of that clause.

"For these reasons, looking to the acts of the Assembly, *to the previous legislation, and to the well known policy of the State respecting* the use of streets by railway companies, there *is room for grave doubt* whether, by artificial roads, the legislature did not mean the graded and paved streets of the city. And if *there are such doubts*, they are decisive against the defendants."

FRESH ABSURDITIES DISCLOSED BY THE JOURNALS — LAW OF MARCH 4TH REPEALED BY IMPLICATION BEFORE IT IS PASSED.

With the light of the journals, shed upon the case, we see, more clearly, the absurdity of claiming this repeal by implication, or the other name for the same thing, to wit, the euphuism, cumulative power.

Then we are to see that the legislature meant to repeal the later law by the earlier law.

That before the law of March 4 was introduced, the House meant to repeal it; they passed it in sport.

So did the Senate mean to repeal it, and passed it in sport up to third reading, when, by some chance, the last became first.

When the Committee on Railroads reported the law

of March 25, they meant to repeal the law of March 4, which they afterwards reported—both, on the same hour of the same day, and by the same man.

Why can we not look at the journals?

We do not now ask to contradict the printed laws, but in order to know how they are to be construed, to show how they passed. Any one must know, the Court will take notice, as the courts say, in the cases before cited, that by their dates, these laws were probably passing at the same time in the same house.

Why can we not show by the record how this was?

Our courts have, for twenty years, declared that the journals, were the true record of what the legislature had done, of which every one must take notice.

The record is printed for the whole world to see. It is public: it is accessible to all.

Even bondholders are bound to know and take notice of this, which is our long-established law.

The printed laws are merely the act of the Secretary of the State.

Colliding with the record, they have the same force with the act of a clerk issuing an execution, without a judgment.

Who will show the distinction between the "clerk," the secretary, and any other clerk? Where comes the right or power to set up his act as having more verity

than the record of which he purports to give but a transcript?

The following authorities, which show how long and well established is this doctrine in this State:

"According to the theory of our legislation, when a bill has become a law, there must be record evidence of every material requirement, from its introduction until it became a law, and this evidence is to be found upon the Journal of the two houses."

Spangler *v.* Jacoby, 14 Ill., 218.
Finly *v.* Logan Co., 17 Ill., 153.
Prescott *v.* Canal Trustees, 19 Ill., 229.
24 Ill., 75.
Schuyler *v.* People, 25 Ill., 185.
27 Ill., 308.
People *v.* Hatch, 33 Ill., 156.
People *v.* Starne, 35 Ill., 131.
Wabash R. R. Co. *v.* Starne, 38 Ill., 178.
Ill. C. R. R. Co. *v.* Wren, 43 Ill., 78.
Bedard *v.* Hall, 44 Ill., 92.
Grot *v.* Cunningham, 45 Ill., 126.
Southworth *v.* Palmyra & Jackson, 2 Gibbs, 287.
Fowler *v.* Pierce, 2 Cal., 165.
Tate *v.* McBridge, 4 Mo., 303.
Thomas *v.* Dakers, 22 Wend., 9.
Warner *v.* Beers, 23 Wend., 103.
Miller *v.* State, 3 Ohio N.S., 475.
State *v.* Moffatt, 5 Ohio, N.S., 223.
People *v.* Purdy, 2 Hill, 31.

Cooley on Const. Lim., 140.
DeBow *v.* People, 1 Den., 9.
Eld *v.* Graham, 20 Cow., 9.
McCullough *v.* State, 11 Ind., 424.
Green *v.* Graves, 1 Dougl., Mich., 351.
People *v.* Mahoney, 13 Mich., 481.
Ferguson *v.* Miners' Bank, 3 Snead (Tenn.), 609.
35 Mo.
43 Ala., 23.
Garner *v.* Collector, 6 Wall., 510.

In a late case in New Hampshire this doctrine is adopted by the court: "The journals are the record and the best evidence; they show the acts of the legislature, while the printed laws have only the authority of a Secretary of State."

Opinion of Judges, 52 N. H., 622, and cases cited.

THE "OBJECTS" SEEN IN THE ACT OF MAR. 25, BY OUR OPPONENTS ARE NOT THE TRUE OBJECTS OF THE ACT.

It is said that the "objects" (p. 30, Arg.) of the acts were different; and to prove this, it is pointed out that the act of Mar. 4 gives Warren county the right to subscribe $100,000 if the Rockford road runs through or near that county, to pay for it in bonds running not more than 30 years; while the Act of Mar. 25 allows the county to subscribe or purchase any sum it pleases if the Rockford road runs through it, and to pay in bonds running not less than twenty years. That under the former the county is to levy a sufficient tax to pay, and

under the latter the clerk shall extend the tax, but the tax shall not exceed $1.50 upon every $100 valuation. That under the first act there is no registration and penalty provided, and under the second both.

This is called the contrasting the "objects" of the two laws! These are material differences which show different objects to be accomplished!

But who is it denies that these laws are different, different in material and immaterial particulars, and that if they apply to these municipalities, they give different powers? We, too, say that they are to be read as one statute, and the necessity of construction arises because if applied to the same corporations, we find the general and loose provisions of the later law repeal the limitations and restrictions of the earlier law in which we see a long cherished legislative policy, as seen in countless acts, and always shown in the legislative dealings with this road in the acts which name it and which give its powers, in respect to the very same contracts and subject matter.

It is precisely because, if construed as our opponents would have them, that these laws are inconsistent in some vital and material respects, touching the interests of communities, that we deny that the later law in which this road is not named, nee! apply to it. Our opponents will say we miss the point of the argument, that what they mean is, that because these laws differ in the particulars noted, they may apply to the same contracts of the same corporations without conflict. But not so; this is the very point which they opened; to say to these municipalities "you can take what stock you please," is to repeal a

prior law which says to them "you may take what stock you please but not exceeding $10,000." Then whether similar limitations and restrictions can be shown to be unimportant—to be no essential and vital matter—nothing to which the legislative mind was directed and as to which the legislative will was expressed, an act striking them down mast be regarded as repealing an earlier act.

The limitations are implied upon corporate subscriptions, and it is most absurd and unreasonable to claim that they are taken off because the form and character of the corporate subscription and payments may differ in the several acts.

How absurd to claim that the legislature might intend to allow a community to take what stock it pleased in a road that run through its county, while they put restrictions upon its power in case the road runs through or near it! To take off a restriction as to amount and make it unlimited, because, instead of paying in 30 year bonds, if they chose they must pay in twenty year bonds or less! To state that the legislature meant to leave the amount unrestricted, and put in instead the restriction on the power of the clerk to extend the tax—a limitation to $1.50 per $100, a pretended limitation, which is really none at all, but one which would prove a tether upon such dealings ouly in some community that meant to give away its whole property—one which could curb no corporate debt ever yet created in any country!

THE DOCTRINE OF "CUMULATIVE POWER" INAPPLICABLE.

But no authorities whatever are found by diligent counsel for this doctrine, which is that of cumulative powers. Those cited in the printed briefs submitted to the Supreme Court, will all be found inapplicable; not one of them is the case of power of this or a similar nature, conferred on similar corporations, to make with each other contracts on the same subject. Every case cited refers to powers of quite a different class; *e. g.*,

To power of courts, and the law, in trials for treason.
Forster's Case 11, Rep. 63.

To power of justices., etc., to license.
Rex *v.* Dennis, 3 T. R. 569.

To powers of parties in proceedings in court.
Rodenbaugh *v.* Kelly, 6 Ohio R., 316.

To powers of trustees winding up bank, to bring suit against debtors of bank.
Turney *v.* Wilton, 36 Ill., 394.

Nearly every other case cited by the learned counsel, to be found on pp. 51 to 57 of argument of C. M. Osborn, on petition for rehearing, are cases we have either cited, or might cite, to support our construction, to wit, that the several acts must be construed together, as being in pari materia, and hence, parts of one statute; and must be reconciled if possible, and that the general words "any company," "any amount," of the act of March 25, need not be held to include this company, nor an amount in excess of $100,000, unless it be necessary, in order that its words shall have any meaning at all!

The case of Casey *v.* Harned, 5 Clarke (Iowa) p. 1, is the favorite case of the learned counsel, and he declares that it is "a case which more fully illustrates the rule under consideration, as well as every other position which I have taken in this case, and may be said to "run on all-fours with it." P. 56 Arg.

But this is also a case which has not the remotest bearing, as far as we can see, upon the rule under consideration; for it is a case where, by the statutes, powers were conferred upon a county, not to create a debt by contract with a railroad corporation; but the powers given were merely to re-locate the county seat, a subject of general concern to the people.

So far as we can see, too, the doctrine of the case is not unsound, as we too often find to be the case in the earlier reports of Iowa; on the contrary, we are unable to see, why it might not be fairly cited as a case in point in support of our construction. There were two statutes, and they were reconciled; and they were reconciled, as we say they should be, by leaving to the later statute, which does not profess to repeal the former, such *meaning as remains for it*, after giving full force to the entire statute.

THE DOCTRINE OF STRICT CONSTRUCTION OBTAINS IN THIS CASE, AS WE HAVE SHOWN, AND FOR DOUBLE REASONS, AND EVERY INTENDMENT IS MADE AGAINST THE POWERS CLAIMED.

As a consequence of this, all rules of construction are enforced to secure these ends. So that where a second

statute giving powers goes over the ground of a former statute, giving new methods of procedure and fresh powers, it will operate as a repeal of the first, unless it takes off limitations and restrictions, when, if possible, they will be construed to stand "for the benefit of the subject."

This is the rule laid down by our Supreme Court; for, in the Illinois & Michigan Canal *v.* The City of Chicago, 14 Ill., 33, and in Sullivan *v.* The People, 15 Ill., 233, it tells us such powers are not cumulative. In Dow *v.* Metropolitan Board of Works, 12 Com. Bench, N. S., 161, the doctrine is thus laid down: "Where two statutes give authority to two public bodies to exercise power which cannot, consistently with the object of the legislature, co-exist, the earlier must necessarily be repealed by the later statute." If, as our opponents claim, the legislature merely meant to express, by the act of March 4th, their intention that these corporations should not make their contracts for a larger sum than $100,000, then, if the act of March 25th, properly construed, really includes these same contracts, and declares a new intention that they may make them to any extent, then clearly the legislature means to wipe out the former law covering the same ground and meant this as a substitute for it. Here is an obvious inconsistency between enactments which forbid them to stand together.

This Doctrine of Cumulative Powers is simply the Doctrine of Repeal by Implication in Disguise.

It is easy enough to see, that this doctrine of cumulative power is, simply another form of words declaring the first

statute repealed, in a case where the new statute covers power given in the old, and besides gives unlimited or additional power; for, in the only matter in which they differ, the earlier law is repealed and destroyed.

"This is quite the reverse of the rule that obtains as to remedial statutes for the benefit of public justice, where subsequent statutes, which add cumulative penalties and institute new methods of proceeding, do not repeal former penalties and methods of proceeding."

Dwarris, 3d ed., p. 535.

So as to two statutes apparently relating to the same subject, *e. g.*, excise licenses and justices' licenses for selling spiritous liquors, where there is a complete difference in the whole purview, the former act remains in force for the same reason.

Rex *v.* Downes, 3 T. R., 567.

So in case of provisions *touching proceedings in courts, in the nature of remedial statutes*, they may be regarded as cumulative, creating a concurrent remedy, and not as abrogating the former mode of procedure: *e. g.*, as to the statute of wills and the possession of the lease.

Rodenbaugh and wife *v.* Kelly et al., 6 Ohio R., 316.

So in the case of an enabling act to trustees to take care of property, it shall not deprive them of power which they then possessed.

Turney *v.* Wilton, 36 Ill., 395.

These cases are cited because, strangely enough, they are referred to by counsel for the plaintiffs to support the

doctrine on which they now place this case, viz., that these acts must be reconciled by treating them as cumulative powers or licenses. This mode of "reconciliation" is simply another mode of claiming a repeal by implication, for it is, in practice, to make the widest license *repeal* the narrower license; practically it reconciles these statutes as the lion, in the jest, is said to lie down with the lamb—to wit: the lamb inside the lion. It is, in another shape, taking the benefit of the doctrine, confessed to be inapplicable and abandoned, of repeal by implication.

The laws described in the authorities just cited, may well be construed for the public interest, as giving added force and power to public justice; but they are strangely misunderstood, when they are cited to give color to the claims of a corporation, whose powers have been fixed by the legislature, to tack on added powers, in the successive revisions or amendment of such corporate powers. Much less is this true when the powers thus claimed are of the wholesale and unlimited character of this law of March 25, for then the courts declare "*every intendment not entirely unfounded*," "*every presumption*, is to be made against the company and in favor of private property."

Scales *v.* Pickering, 4 Bing., 452.

Commonwealth *v.* Central Pass. R. R., 52 Pa., 516.

It is no wonder, therefore, that the Supreme Court of the State recognized the question to be, simply, is the act of March 4 repealed by implication? and adhered to the

same view on re-hearing, notwithstanding the arguments of the learned counsel.

THERE IS NO ESTOPPEL IN THIS CASE. BONDHOLDERS MUST TAKE THEIR POWER AS IT IS.

It cannot be doubted that the same rules of interpretation must govern in the construction of the same statute, no matter who are the parties to the suit; unless indeed in a case, where the people are estopped to allege the truth, and it is scarcely worth while to stop to show that this is not such a case.

The county received and holds nothing in exchange for these bonds.

It is true the clerk, Wallace G. Bone, received a worthless certificate of stock pending the suit to set aside the whole proceeding, including the subscription, if made; but it is also true that in that very case, the subscription was in terms set aside, and that in pursuance of it the Board of Supervisors directed their clerk, as appears by the record of their action, to return the stock to the company, declaring this receipt of it illegal.

It does not appear that the county ever voted upon it; it does appear that Turnbull was appointed an agent touching the stock, and Lewis after him pending the suit; but these acts resulted in no action, and like the receipt of the stock were all unquestionably avoided by the final decree in that suit, and of course could not affect the rights of the people asserted in such litigation. Indeed it is a sound principle of law entirely applicable here, that men acting as were these professed agents of

the county could do nothing to increase their power or confer upon themselves power; in short, pending suit by the people to stop their action, could not ratify one illegal act by another.

These purchasers of bonds who in this case then can point to no estoppel, must at least take care that the apparent power was given; and the rules by which the law ascertains what is the meaning of a given act, they must at their peril observe. These purchasers were not, in fact, deceived at all.

In this case particularly, the purchaser cannot complain of being deceived as to the apparent power. They never looked at the law of March 25, and were not cheated by its generalities.

The bond does not recite that law; nor any law; and the reason is that it was not the law, nor known or suspected to be the law when the election was had and the bond printed.

The People never Voted $200,000 to this Company, nor under this Act.

In the original argument in the Supreme Court of C. M. Osborn, Esq., p. 7, the subscription was defended against the danger that it does not include the $100,000 previously voted upon the ground that although (we quote) "the subscription prescribing that this aid is to include the $100,000 previously voted to the Alton road," yet counsel say "that the $100,000 previously voted to the Alton road was voted under the law of '49," so that supervisors may subscribe or not; "and that the supervisors

never did subscribe to that road." See Record, affidavit of Carter, p. 498; affidavit of W. G. Bone, p. 381, et seq. The author (C. M. Osborn, Esq.) continues: "That the vote was had in 1856, thirteen years before this vote was taken;" "and we think the new vote would supersede the old at all events." To see that this is no blunder of the astute counsel, the court will please turn their eyes to a statute of '69: whereby an act of March 11, 1869, entitled "An act to legalize the transfer of certain franchises and rights of action to the Rockford, Rock Island & St. Louis R. R. Company," (p. 346 Pri. Laws, 69, vol. 3) the legislative sanction is given to a transfer of the road of the St. Louis, Alton & Rock Island R. R. Co. in pursuance of a deed made, and all the acts of the county, city or town authorities in the county of Warren and in the first six counties (the same named in the Act of Mar. 25), in ordering elections to the capital stock of either of said companies, are declared binding.

By the 2d section: All subscriptions of said municipalities heretofore voted to either company are vested in the Rockford Company, and the company authorized to demand and secure the same; provided the Rockford Company build the road within the time stated in said deed, and in case of failure its rights under this act to be void.

This is the act under which, in fact, the extra $100,000 was meant to be taken, that sum having been before voted by Warren County to said Alton company. It was this proposition the supervisors voted should be submitted to the people. This was the proposition stated in

the notice of the election, and this is also the language of the pretended subscription to the Rockford Company. In truth it is a complete afterthought—this attempt to justify this subscription under the loose provisions of the act of March 25.

It is, therefore, clear enough that all these proceedings took place under the act of March 4, with whose provisions the blundering majority of the supervisors were in such a hurry as to fail to comply, although giving barely time to do so and, had the newspapers issued in time; and the extra $100,000 was meant as a mere assent to the transfer made by the Alton road to the Rockford road referred to above and confirmed by the legislature.

IV.

NO APPARENT OR REAL POWER.

The Act of March 25th is Unconstitutional.

"The only authority for the issue of the bonds in ques-
"tion was an unconstitutional act of the legislature; they
"are void—void from the beginning, and void into
"whosesoever hands they may come.

"All persons must, at their peril, take notice of the
"power of municipal corporations or officers to issue
"securities, and especially is this so where the want of
"power results from constitutional limitations or provi-
"sions.

"The Floyd Acceptances, 7 Wall., 676.
"Marsh *v.* Fulton Co., 10 Wall., 676.
"Clark *v.* DesMoines, 19 Iowa, 199.

"Steiner *v.* Franklin Co., 48 Mo., 167."
Commercial Bank *v.* City of Iola, 2 Dillon, 865.

See also:

Allen *v.* Inhabitants of Jay, 12 Am. L. Reg., N. S., p. 481. Supreme Court of Maine, July Term, 1871. Cited in note. 2 Dill., 865.

The powers given by the laws of the act under discussion are "the most important of any which can be conferred upon municipal corporations. They are, indeed, precisely the powers the exercise of which is most to be feared, and which are particularly liable to be unwisely conferred by special legislation." (2 Dill., 856.)

Police Jury *v.* Britton, 15 Wall., 571.

This act violates Sec. 23 of Art. 3 of the Constitution of the State, which provides that "no private or local law which may be passed by the General Assembly shall embrace more than one subject, and that shall be expressed in the title."

IT IS A LOCAL LAW.

That the act in question is a local law is so plain as not to justify any discussion. It is not only limited in its application to eight counties, and the towns of these counties under township organization, but to the railroad companies whose roads run through said counties and towns, and to the subscription ofstock in said companies.

1 Cooley's Black., p. 86, note 13, and cases cited.

Whether it be not also a private act, notwithstanding it is declared to be public, is by no means free from doubt. But this law is certainly local, as being confined to particular places—to a particular part of the State.

Dawson *v.* Paver, 5 Hare, 433.
Richards *v.* Easto, 15 M. & W., 251.
People *v.* Hills, 35 N. Y., 431, and cases cited.

As stated in Pierce *v.* Kimball, 9 Greenleaf, 56, acts are sometimes considered public acts, and yet they are local, because the application of them is and must be local.

This constitutional provision is framed to cover this distinction, using the language, "no private or local law," etc.

Constitutional Provision is Mandatory.

That the provision is mandatory is now well settled by the decisions, not only of this State, but by the highest judicial tribunals in nearly all the States. Indeed, in the language of Mr. Justice Emmot: "It will be found, upon full consideration, to be difficult to treat any constitutional provision as merely directory, and not imperative."

Protho *v.* Orr, 12 Geo., 36.
Op. of Judges, 6 Shep., 458.
Indiana Central *v.* Potts, 8 Ind., 683.
People *v.* Starne, 35 Ill., 121.
State *v.* Miller, 45 Mo., 495.
Weaver *v.* Lapsley, 43 Ala., 224.
Cooley's Const. Law, pp. 82, 83.
" " " (2d edition), p. 150.
" " " p. 78.

The Supreme Court of this State have recognized this provision as mandatory in a series of cases, and have enforced its provisions in People *v.* Miller, 32 Ill., 188.

The decision of the State Court on this and similar questions, "respecting local questions peculiar to itself, or respecting the construction of its own Constitution and laws," will be adopted as rules for the judgment of the Federal Courts, and the Federal Courts will follow the interpretation of the Constitution which had been declared at the time the act in controversy passed, or when the paper, which claims to have been authorized by such act, was issued; unless, indeed, the State adjudication rests upon general principles of law, and not upon the meaning of special constitutional or legislative provisions.

Butz *v.* Muscatine, 8 Wall., 535.
Olcott *v.* Board Supervisors, 16 Wall.
Comm. Bk. *v.* Iola, 2 Dill, 358.

This act infringes this constitutional provision in two particulars: 1st, because it embraces more than one subject; 2d, because its subject was not expressed in its title.

FIRST.—THIS ACT EMBRACES MORE THAN ONE SUBJECT.

First, that it embraces more than one subject is seen from the fact that it embraces many corporations, viz: The counties of Rock Island, Warren, and six others, and their towns, and the railroad companies whose roads run through any of them. The law was a fraud, perpetrated by a violation of this provision which was meant to prevent "omnibus" legislation.

In the sense of the word "subject," as used in the Constitution, municipal corporations, or railway corporations, or both classes of corporations, are the subjects.

The powers of the corporations of the several railways now running through, or which shall hereafter run through the territory of said municipalities, te take stock subscriptions from the counties and towns along their respective lines, is not the same subject.

A SINGLE CORPORATION AND ITS POWERS IS THE WIDEST CONSTRUCTION YET GIVEN OF THE WORD "SUBJECT."

The utmost stretch of construction yet given is that such a subject may be the creation of a single corporation, and conferring power upon it, germane to its general object, viz: to contract with many other corporations for stock, to obtain means and facilities of constructing its line, or for carrying out its general purpose.

Belleville R. R. Co. *v.* Gregory, 15 Ill., 28, 29.
Firemen's Association *v.* Lunsburg, 21 Ill., 511.
O'Leary *v.* County of Cook, 28 Ill., 537.
Ottawa *v.* People, 48 Ill., 238.
Supervisor of Schuyler Co. *v.* People, 25 Ill., 182.
Phillips et al *v.* Albany et al., 28 Wis., 356.
The People *v.* Mahoney, 13 Mich., 495.
Morford *v.* Wunger, 8 Iowa, 82.
Brewster *v.* Syracuse, 19 N. Y., 116.
Sun Mutual Ins. Co. *v.* Mayor, 8 N. Y., 252.
Mayor *v.* State of Md., 20 Md. 119.
Davis *v.* State, 7 Md., 159, 160, 161.

Arnoult *v.* New Orleans, 11 Lou. Ann., 56.
Mills *v.* Charleton, 29 Wis., 407.
Winona & St. Peter R. R. Co. *v.* Waldron et al., 11 Minn., 532–5.

In many of these cases, the courts preserve the validity of the law by deciding that but one subject is embraced in it; but in all the cases — in every one of them — this definition is given of a subject, by which, if this law be tested, it will be found unconstitutional, because it contains two or more subjects.

THE FOLLOWING CASES ARE NOT EXCEPTIONS:

In *State* v. *Judge of Davis Co.*, 2 Iowa, 282, a law apparently local was declared constitutional, although it embraced many different State roads, but only because it was meant to establish a "system of State roads."

And in *Erlinger* v. *Boneau*, 51 Ill., 99, a law, including several counties, forbidding cattle to run at large, was found constitutional, against a singular objection, only directed to the fact that the title *did not include precincts;* and Chief Justice Walker, in delivering the opinion, speaks of this common public interest, the restraint of cattle within common law bounds, as a single subject. *The objection was not taken that the law had violated this provision in any other particular.*

But no cases go further than this, and none can be found, UNLESS IN STATES WHERE THE CONSTITUTIONAL PROVISION EXTENDS TO GENERAL AS WELL AS LOCAL LAWS, in which States a class of things, or a distinct branch of rights or

contracts, are found to be a proper "subject" for a general law, from the necessity of the case.

"RAILROAD SUBSCRIPTION" IS NOT A SUBJECT FOR A LOCAL LAW WITHIN THE MEANING OF THE CONSTITUTIONAL PROVISION WHICH WAS AIMED AT "LOG-ROLLING."

But in others we find more direct aid, because they pronounce upon acts closely resembling the act under consideration.

The case just cited from 11 Minn. is one of these cases.

The People *v.* Supervisors of Chautauque, 43 N Y., 11 and 22, is another. And in both cases the acts were declared unconstitutional, although in each was a common subject for the law, in the same sense in which railroad subscription might be claimedt to be the subject of this law.

In 11 Minn. that common subject was the obligation to construct and maintain a legal fence along lines of road, unfenced by said company (constructing a railroad from Winona by way of St. Peter), or by any railroad Company formed by way of consolidation with the Winona & St. Peter R. R. Co.

In 43 N. Y. that common subject was appropriations for expenses of government and supplying deficiency in former appropriations. In both cases the laws were held unconstitutional, notwithstanding the "subject"; because, just as in the case under consideration, the several laws were not germane to the subject of the incorporation of any single company.

In the very recent case (May, '73,) of People *v.* Supervisors, 52 N. Y., 566, the court had occasion to construe the meaning of the following words in three constitutional provisions, viz., of Sec. 12, Art. 7, which prohibits contracting a debt, viz., "unless authorized by a law for some single work or object, to be distinctly specified therein;" and of Sec. 8, Art. 7, which requires the act, viz., "to express the object to which the money appropriated is to be applied; and of Sec. 13, Art. 7, which requires that every law imposing a tax, viz., "shall distinctly state the tax and the object to which it is to be applied, and that it shall not be sufficient to any other law to fix such tax or object."

The court held the acts there in question void; holding that the language of the first section of the law making the appropriations, and appropriating among others to pay "the present acknowledged deficiency and estimated liabilities of general fund after Sept. 3d, 1872," did not "*distinctly specify* the object of the appropriation, that the language of the second section by which the means were funded to pay the appropriation of the first section declared to be for the canals" and "to pay the floating indebtedness and estimated liabilities of the State," did not "*express* the objects to which the money appropriated are to be applied," and that the language of the other sections of the act, viz: "that a tax shall be imposed of three and a half mills, or so much thereof as may be necessary to provide for the payment;" that this language, which left the tax to the discretion of the administrative officers, did not distinctly state the tax and the *object to*

which it is to be applied, as respectively required by the several constitutional provisions above referred to."

This case is an example of the strictness which should be required in enforcing these constitutional provisions, which are justly regarded as made "*for the protection and preservation of the public credit, sure guarantees for the public creditors, and efficient guards against the creation of a public debt without the intelligent, deliberate assent of the people.*" They are held to be devised to secure to the electors the information *necessary to the intelligent expression of their will*, and to enable them to act upon the proposition unembarrassed and undisturbed by interests and influences other than that connected with the character and importance of the single wish or object for which it should be proposed to contract the debt."

This language is seen to be closely applicable to the enforcement of the provision under consideration. The reasons given for declaring that the object of the appropriation is not expressed are also closely applicable to this case under consideration; because, there as here, by the use of general language, there the word "appropriation," here the word "subscription," including many objects, it was attempted to nullify the Constitution.

The Court say:

"It is true the act makes a show of respect for the Constitution by writing "appropriation" in the singular number, and declaring that the debt shall be for the single object of raising the money to pay the "appropriation herein named." But the Constitution cannot thus

be nullified. The appropriations are, in fact, many, and their objects many and diverse, and they cannot be reduced to one, and the objects and works made a unit by the mere dash of a pen or the construction of a sentence. Neither is the object of the debt made single, by declaring it to be for the payment of the aggregate of all the sums of money appropriated by the act."

"The work or object contemplated by the Constitution is the public work or object to be accomplished by the expenditure of money to be borrowed. If an appropriation had been made for a single purpose or object, a debt might perhaps be created for the payment of that one appropriation, upon the principle that that is certain which can be made certain; and by reference to the law making the appropriation, the object or work for which the debt was to be contracted would be ascertained.

"The design of the Constitution was that the specific purpose of the debt should be specified in the act, that the legislature and the people, who were to vote upon it, could read it there; and a departure from the letter of the provisions may frustrate its intent. It is true, here the appropriations and the authority for the debt are in the same act; so that the law is not obnoxious to the objection that would exist if they were in separate acts. But the difficulty remains that, notwithstanding the form of the second section, the "work or object" for which the debt is authorized is not a single work or object; neither are the objects defined or capable of being ascertained from the act itself.

"The act appropriates, in different sums, varying from

$2,500 to over $4,000,000 respectively, an aggregate amount of over $6,000,000: but each appropriation is for a different work or object. The Constitution would be of little value as a restraint upon the debt-creating power if it could be evaded by bringing together in one law distinct appropriations of different amounts, for a canal in one part of the State, in aid of a railroad in another, building a lunatic asylum in another, and a State prison and a normal school building in still other parts; and thus a debt could be authorized for the single object of raising the money to pay the "said appropriation." The act is clearly violative of the Constitution, so far as it authorizes the creation of a debt; and this is the ground upon which it should be declared void, as the ground which best preserves the Coustitution in its integrity. * *

"There is no attempt, as in the act authorizing the debt, to preserve the semblance of a compliance with the Constitution, by incorporating into the enactment a phraseology somewhat resembling that of the Constitution.

"The object of the tax is plainly and clearly fixed, or attempted to be fixed, by a reference to other acts and State documents. There is no escape from the conclusion to which this examination leads, and the only safety is in adhering strictly and giving effect to every part of the Constitution regulating the appropriation of public moneys, and restraining and regulating taxation and the debt-creating power.

"The power of taxation can only be exercised within the limits and in the forms prescribed by the Constitution.

"There is no dispensing power anywhere, or any rule of construction, by which the restriction can be relaxed, or the terms of the power varied or enlarged, * * *

If an acknowledgment by the comptroller of a deficiency, a statement by him of estimated liabilities, is a sufficient statement of an "object," either for an appropriation, a debt or a tax for a sum in gross, the framers of the Constitution labored to little effect, in devising and creating the stringent provisions of that instrument. * *

But without considering further the general features of the legislation under consideration, it is sufficient to say that if acts as general and indefinite as to object and purpose as these could stand, a very easy way would be opened for the creation of a debt, by the imposition of a tax for works and objects entirely undisclosed, and the moneys to be realized from either would be very much at the disposal of the legislature.

It would be difficult to say that any application of them was not within the general purposes named in the acts, or in some other act or public document to which reference was made.

In Pullman *v.* Mayor, 54 Barb., 169, the Supreme Court held that a similar constitutional provision was violated by an act which was the tax levy in New York for 1869, and yet restricted the power of that same corporation to make contracts. These the court held were distinct subjects.

In the People *v.* Lawrence, 36 Barb., 192, the court in holding that an action relative to assessments in Brooklyn

was constitutional, had occasion to define what is meant by the word "subject" in this provision. The constitutional provision of New York, and of this State, being identical, the court say of the word in question: "*It is the matter to which the statute relates, and with which it deals*, AND NOT WHAT IT PROPOSES TO DO, WHICH IS TO BE FOUND IN THE TITLE. It is no constitutional objection to a statute that its title is vague or unmeaning as to its purpose, or if it be sufficiently distinct as to the matter to which it refers."

This act infringes this branch of the constitutional provision, requiring that a private or local law shall relate to a single subject, because the matter with which the statute deals is the power of certain municipal corporations to contract with an indefinite number of railway companies; this is, not one matter but many matters therefore, which are distinct not only in themselves, but have no common relation to any one matter—to any single corporation.

It is not enough that what the statute proposes to do for each corporation is the same, viz: to authorize a contract between the several corporations of the same kind.

This is within the letter as well as the spirit of the constitutional prohibition; and the subject cannot be made one by a generalization; by a dash of the pen or the turn of a sentence.

SECOND. BUT THE ACT ALSO INFRINGES THE CONSTITUTIONAL PROVISION BECAUSE ITS TRUE SUBJECT IS NOT EXPRESSED IN THE TITLE.

It is still more clear that this act infringes this provis-

ion because its title does not express the true "subject" of the act, *to wit: the corporations whose powers it regulates, for these are the matters to which the statute relates and with which it deals, and it is these matters, and not what it proposes to do, which is to be found in the title.*" (36 Barb., 192.)

People *v.* Hill, 35 N. Y., 453.
People *v.* Commissioners of Palatine, 53 Barb., 70.
People *v.* Chautauqua Co., 43 N. Y., 21.
Durkee *v.* Janesville, 26 Wis.. 697.
Lauer *v.* State, 22 Ind., 461.
The People *v.* Mellen, 32 Ill., 183.
Cooley's Const. Lim., p. 141.

THE TITLE IS BAD.

No notice was given to people or legislature by the title that their interests were being touched by legislation; and the title is obscure for that purpose! In such a legislature as that of 1869, this was indispensable, since it was impossible to read the laws which passed during the session, whatever diligence was used! They were in manuscript, and were not printed for many months afterwards. Indeed the proof here is that the member from Warren never heard of this law, though recorded as voting for it! Yet he knew of the other laws touching the county — of the others relating to this company! and thought he had guarded the corporations he represented against imposition by careful provisions limiting the amount of subscription in the entire county to $100,000 by both laws! while under this act the company could

take whatever it could get, and in fact took $350,000 from county and towns!

THAT THE TITLE MAY EXPESS THE SUBJECT WHEN TAKEN WITH THAT TO WHICH IT REFERS, IS NOT ENOUGH.

It is said the title refers to the body of the bill to state the subject of the act, and that this is sufficient, because thus it is within the principle that that is certain which can be made certain.

This is a plain violation of the principle which led to the constitutional provision.

The very evil is that the title shall itself tell what the, subject is, so that you need not look into the act to know what the title is; that those who see nothing but the title may know from the title that their interests are concerned in the law proposed to be enacted.

Cooley's Lim., 144-5.

The provision was aimed at this very mode of giving an act a title, which could only be held to express the subject by reference to the act ifself. The title was on its face to express its true subject—to speak for itself, so that all might know at what subject the act was aimed, by the title itself.

CONSTITUTIONAL PROVISION SHOULD BE CONSTRUED SO AS TO PREVENT THE MISCHIEF AT WHICH IT WAS AIMED.

We do not ask here that a technical interpretation be put upon the constitutional provision, or one which shall embarrass legislation and encumber laws with long and

prolix titles; but it is the duty of the court to place such a construction upon it as shall guard against the mischiefs intended by it to remedied.

SUCH AN EXTRAORDINARY ACT AS THIS COULD NEVER HAVE BEEN PASSED HAD NOT ITS PASSAGE BEEN CONCEALED FROM THE LEGISLATORS AND PEOPLE WHOM IT AFFECTED, BY FAILING TO STATE IN ITS TITLE, AS REQUIRED BY THE CONSTITUTION, THE PART OF THE STATE OR THE CORPORATION WHOSE INTERESTS IT AFFECTED.

In the language of the Supreme Court of New York in The People ex rel. Failing v. Comrs. of Highways of Palatine, 58 Barb. 70 "That the act was conceived in fraud and its title designed to defraud, its extraordinary provisions and the attempted action under it is practical confirmatory evidence."

ACT SHOWS BY UNLIMITED POWERS MEANT FOR NO GOOD PURPOSE.

This is shown in the case of this Act by the license it inaugurates, in the particulars it proposes to control. No restrictions as to the railway company, with whom the municipal corporations may contract; no limit as to time or as to amount of subscription; no requirements of a single *prerequisite*, not even that the vote shall precede; and no regulations, no provisions for notice, either as to time or the character of the submission of the question—all left to the discretion of the convenient agents.

It is also shown by the fact that the other two Acts, unmistakeably expressing the legislative will, in regard to the same contracts of these very corporations—two acts of the same month, of the same session, of the same

legislature, one earlier, one later than this, contain restrictions, and limitations, and requirements, and conditions, wise, and careful, and guarded, in all these particulars, showing a policy and a will the very opposite of that, which this Act attributes to the same legislature. as having at the very same time, on the very same subject! It is scarcely necessary to refer to the proof given by the member of the legislature who represented Warren, who tells us what we need no proof of, that he never heard of this Act until the session was over, and thought that he was guarding the interests of his people by the careful provisions of the two acts, in which this road was named! Here is a demonstration if one can be given, a demonstration from the face of the Acts themselves, that this Act which does not comply with the Constitution; does not express the legislative will: a demonstration, at the same time, of the wisdom of this constitutional provision, by which is secured to legislators some knowledge of the acts being passed in their presence, and that otherwise may be passed not only without their knowledge, but against their will!

Easy to Comply with this Provision.

It was perfectly easy to name in the title the counties and the railroad company, for whose benefit the act was procured; and it might have been a compliance with the Constitution if either had been named.

Such a title would have expressed the true and actual subject.

But this title gives neither location nor subject. The

subject is not fairly or honestly expressed in the title, but carefully avoided. It is ingeniously devised to ward off suspicion or inquiry.

THE TITLE MUST SHOW THE PORTION OF THE STATE TO WHICH IT APPLIES.

The true design of the Constitutional provision, "That no segregated portion of the State or its people should be made the subject of legislative action, unless the bill effective thereof in its title gave notice to it and its representatives of such purpose," (43 N. Y. 21) is defeated by this title. No human ingenuity could guess from the title to what part of the State this local law related.

The case in 26 Wis., 697, and this in 43 N. Y., are directly in point, to wit: that the title must show the portion of the State to which it applies.

If this be a sufficient title, then this constitutional provision proves worthless; for the design of it has been ever by the courts declared to be, that notice should be given by the title to the legislator or the citizen of the contents of proposed laws.

No legislator, however industrious, could protect his constituents, no citizen, however vigilant, could protect the interests in his charge, if he assumed, as he had a right to assume, that he could rely, for a knowledge of the contents of the laws that were being passed, upon the information which the Constitution ordained should be given by their titles.

THIS CONSTITUTIONAL PROVISION HAS BEEN ENFORCED WITH CONTINUALLY INCREASING SEVERITY IN EVERY STATE IN WHOSE CONSTITUTION IT IS FOUND.

Remarkable illustrations of this are seen in all the States; but in the great leading States of Pennsylvania New York, two recent cases are worth pointing out, which furnish the strongest evidence that the courts see the necessity of enforcing this provision.

In Dorsey et al *v.* Donnelly's App., 72 Pa., 193.

The court, while holding a section of an act entitled "An Act relating to liens upon leasehold estates," was unconstitutional, because said section extended to freeholds, and declaring this constitutional provision "to be meant to correct *the evils of improvident and corrupt legislation*" express their doubt whether the statute sustained in 8 P. F. Smith, was a good law. The latter was a case in which an act, entitled "An act to increase the boundaries of Forest county," contained, and provision to fix the county seat of said county, and the court at that early day took the view which our court early took in the series of cases in which the power granted and questioned was found, to be germane, to be the one subject — the single corporation named in the act.

In New York, likewise, in the very late case of the People *v.* Briggs et al, 50 N. Y., 561, the same tendency to greater strictness is observed. Church, C. J., delivering the opinion of the court, declares that there are doubts whether the intimation given in the case of People *v.* Hills, 35 N. Y., 449, would now be held sound law, viz:

That if the title of the act, condemned as unconstitutional in that case, instead of saying, "An Act to amend chapter 389 of the laws of 1851," had entitled it "an act to amend section 290 of chapter 389 of the laws of 1851," a reader, by referring to that section, might have obtained some notion of what the subject matter of the act related to.

The essence of the whole matter as stated in both cases—in all the cases—is that the title of an act "*should be so certain as not to mislead.*" It is because this title did mislead, because it was calculated to mislead, the legislator and the people who were providing for all the railroad subscription they were interested in, by other guarded and wise laws, and therefore would be the last to feel interested in a subject carefully provided for, because it was a title fitted to take the people and legislators of this locality on the blind side, and is so dark in its generality as to do this this thing, that it is squarely within the shot of this constitutional provision.

It seems to us clear that it should be enforced as to this law; that a stronger and clearer case for its application will not soon be found.

The Company had Power Enough.

The legislature of 1869 had liberally dealt with the railroad company in a series of laws in which it was named, and on March 4, and again on March 26, regulated its power to receive the bonds of the municipal corporations along its line in exchange for its stock.

But Imposed Usual Restrictions.

The legislature had adhered to the time-honored rules, that limitations should be imposed upon this debt-creating power, and jealously guarded the power granted in each law, and with continually increasing severity and care, the latest law imposing the greatest restrictions, and leaving the exercise of the power guarded against possible abuse, by requiring elections, the vote of the majority, and at least thirty days' notice to the people of the election, and forbidding the several subscriptions of the corporations of each county to exceed $3,000 per mile of the road in eacd county.

Law of March 25 is a Monstrosity got through to take off Restrictions.

Now the published laws disclose this statute of March 25th, in which all restrictions are taken off. No election before subscription, no notice before the election, no limit of the sum subscribed, are required. The law assumes the unusual form of an independent grant of power, to eight counties named in the act and to their towns, to subscribe stock in any railroad company passing in whole or in part through them, or either of them; the usual way being for such power to be given in the charter of the railroad company itself, as it is, in truth, the railroad company which seeks the aid. Here we are to suppose that these counties and their towns petitioned for power to subscribe stock in all roads which pass through them, organized or to be organized. Provident corporations these, we are to believe, who unite to the number of some hundreds, and ask this power, and, stranger still, not with their minds

united on any particular company, but upon all companies for all time!

LAW JUST INCLUDES COUNTIES ALONG THE LINE OF THIS ROAD AND NO OTHERS.

Strange enough, too, these counties are not neighbors, but form in single file, a curving column extending from Rock Island nearly to St. Louis! How strange that these corporations should unite in asking for this law, when no railroad passing through either of them would be likely to pass through its neighbor, except in the event that it curved from north to south between the points named! in short, except that it pursued the route of this road!

For through this line of counties, nearly in the order named, this road was located.

THIS ACT WAS PASSED IN DISGUISE; SMUGGLED THROUGH.

Now, if these adventurers had fairly presented such a law, and sought its passage, unless the legislature had abandoned the sound views that controlled them on March 4th and 26th, that law would have met defeat; and they knowing it, and determined to get it, smuggled it through under this false title.

What reason for such language ostensibly embracing many roads, and really embracing but one, except that it served to disguise the fact that this company was seeking fresh power, and power on terms that the legislature had just denied, and was denying, by the law of the next day? They wanted $350,000 from the county; the legislature had said and were saying they could have but $100,000.

They could not get through a law giving them by name such power; perhaps could not get through a law giving such power at all; and they were driven to put through this law with this disguised title and terms, and under it have already received more than they could take by the genuine laws, and these bondholders are now, with much clamor, crying out that they are being wronged, because they are not allowed to carry off a quarter of a million dollars more!

No Room to Suppose a Change of Mind by Legislature.

Luckily there seems no room for doubt as to what the legislature meant. We have their views on March 4, and we have them again on March 26, and hence there is no room to set up the pretense, that they might have changed their mind from a policy of restriction to a policy of license, for we see that the only change was in the direction of their plain duty — as guardians of public interests—of increased care, of added and judicious restriction.

There therefore seems no room for escape from the conclusion that this constitutional provision was evaded as to this law *with the view of defeating the legislative will.*

There is no intention of the legislature; no spark of legislative intention in this act. They knew nothing of it; they meant nothing by it.

Every effort to reconcile it with the other laws is in vain, unless you confine it to the other pretended railroad corporations organized or to be organized, for which it

so gratuitously provides, and unless you except this railroad from its provisions, upon the ground that it is controlled by the acts in which it is mentioned and which were undoubtedly meant for it.

To Give Effect to this Act is to Defeat the Legislative Will, Expressed in the Other Acts.

The truth is: To give effect to this law, and control, by its bastard provisions, the legitimate acts of the 4th and 26th, is to defeat the legislative will. This law is a mere act of "piracy;" cutpurse and pickpocket of legislation; a wrecker of corporate right, sailing under the black flag.

It was put through under a false title, because it would not go through under a true title.

It never mentions this railroad and yet is meant for it and for no other, and in proof of this now, this company come forward, and this company alone, and ask the benefit of it.

In so plain a case we appeal to this court to enforce the wise provisions of our Constitution, which forbid the passage of such laws.

That this Act was shown to have been used to defraud helps the proof that, on its face, it was meant to defraud.

This too is shown — that this act was designed to defraud — by the fact now adjudicated, that under cover of it a fraud has been committed — by the fact that these bonds have been fraudulently and illegally issued!

Here then is a violation, not alone of the letter, but of the spirit of the constitution. This act is not only bad within that letter, but it is bad in its provisions, is adopted for bad purposes, and has been put to bad uses.

The Doctrine of Apparent Authority came from New York.

No one can read the 16th and 34th of N. Y., the Schuyler case, and that of the Butchers' & Drovers' Bank, and the earlier cases decided by Judge Nelson, while in the Court of Appeals of New York, without seeing that we owe to New York the doctrine of the prevailing opinion by the same judge, then Mr. Justice Nelson of the National Supreme Court, delivered in Knox County *v.* Aspinwall, 21 How., the first case in which the broad doctrine that the apparent power given by the statute, coupled with the act of the agent, issuing the paper apparently under it, is laid down to be all that is required to protect the bona fide purchaser.

This doctrine drove New York Courts to enforce the Constitutional Provision.

It is no wonder, that if such efficacy, such consequences, attach to acts of the legislature, it is no wonder that the same court of New York is driven to enforce every safeguard of the constitution against fraudulent legislation! Indeed, if the property of the people may be given away by their agents under color of such an apparent authority, is it not so much the more important, that it be rendered difficult for designing adventurers or agents to secure such an easily abused power — that the

people should be allowed to say that they will not trust the agent with power which, if given, they are powerless to control or restrain?

NEW YORK CONSTITUTIONAL PROVISIONS SAME AS OURS; WE ADOPTED IT FROM THEM; AND THIS WAS THE CONSTRUCTION WE TOOK WITH IT, AND EXPERIENCE TAUGHT NEW YORK AND TEACHES US THAT WHERE THE DOCTRINE OF APPARENT AUTHORITY PREVAILS, THEN IT IS NECESSARY TO SCRUTINIZE WITH GREAT CARE WHETHER IT HAS BEEN GIVEN OR ONLY TAKEN — IN SHORT, STOLEN.

This constitutional provision is the very same, or substantially the same as that in New York; and the decisions of those courts, who have favored us with planting or enforcing, first on American soil, of this remarkable doctrine by which the principal can no longer protect himself against the abuses of power of his agent — these decisions upon this provision ought, and it is apparent in the interest of justice for the protection of the public, must be adopted! The public must have some opportunity to guard themselves against their agents; and the New York courts seeing this, have enforced this constitutional provision with commendable vigor.

IMPORTANCE OF ENFORCING THIS CONSTITUTIONAL PROVISION.

If the Constitution be not altogether waste paper, it has restrained the power of the legislature in these particulars. If it has any meaning, it is that the people shall have some voice in the making of their laws; and shall not have their property taken from them by adventurers, who first get an act conferring upon some officer of the

county apparent authority, and then get out, by any indirection, bonds which are claimed to be in pursuance of it—a second and easy fraud, fastening upon the county a former fraud!

But two acts — an omnibus bill, a convenient clerk of the legislature; a complaisant board of supervisors, and this is all which it takes to steal the property of the people, to steep them in poverty, to bury them under an unjust debt which deprives them of the comforts of life, of education, to condemn them and unborn children to want.

This is not justice, but organized robbery, and there should be a way to defeat it.

But there is no way but through the courts, or through revolution.

Corruption you Cannot Guard Against if the Rewards are to be of such Magnitude.

Here was enough to enrich every leading lawyer; every prominent officer; every public man!

The persons to be protected are the poor, the orphans, the children, the unprotected of every class and age and condition, and to you alone—to the courts alone can they come for protection.

You can do nothing if the law does not permit! But here are clear provisions, construed in accordance with the requirements of justice, and we ask that they shall be enforced!

THIS COURT WILL NOT ADOPT A DOCTRINE WHICH WILL DEFEAT THIS PROVISION.

Surely this court will never stretch the doctrine further—and, annihilating the distinction between a public and a local law, defeating the object of the constitutional provision, so far as it was aimed at omnibus legislation and log-rolling, confounding the subject of an act with what may be done under it—declare that to subscribe stock in railroad companies is a sufficient subject! Certainly not, when it is not the true subject, nor the whole matter about any subject; for, be it remembered, the act does not authorize these counties to take stock in all railroad companies, as this phraseology of the title imports, but only in those which run through the county.

Nor will the court hold, that the title need not express the subject, and that, therefore, even granting that the eight counties and towns are the subject, that it was not necessary to name them, but it was enough to say "therein named"—in short, enough not to express the subject at all, but instead to refer to the body of the act, where the subject can be found—thus cheating the constitutional provision, leaving legislators and people, who can only learn of modern legislation by the title, open to the frauds against which their only safe guard is that the title shall express the true subject.

Surely when the utmost stretch of judicial liberality, sustaining useful laws, has declared that a local law can constitutionally embrace but "one corporation and the powers germane to it"—a doctrine challenged and denied in other States by courts of at least equal authority—

this court will not be found, dispensing with the constitutional provision, by holding that a hundred corporations will serve for the single subject meant by the Constitution!

THIS LAW OUGHT NOT TO BE IN FAVOR WITH THE COURT.

In sustaining a similar objection, to wit, that the law was unconstitutional because it violated the constitutional provision of the State of Kansas, forbidding special legislation (Commercial Bank *v.* Iola, 2 Dillon, 362), Judge Dillon very justly says:

"Compulsory taxation in favor of railways and like public improvements, owned by individuals or companies, is an exercise of power *going quite to the verge of legislative authority.* Although it is a doctrine that must now be considered as judicially settled, still it is one that has encountered a vigorous opposition, both on the ground of expediency and of power, and the exercise of the authority has been to disastrous as to have lead, in this State, to constitutional provisions for the protection of the citizen altogether prohibiting it."

If you decide that so blind a title will serve, and then hold that the election must stand, although no notice was given of it, you strike down at one blow every safeguard of the citizen, and compulsory taxation under such circumstances is not one whit better than highway robbery. The property of the citizen is taken in spite of the utmost vigilance, and the court refuses to sustain him in his stand against wholesale corruption!

TIME TO CRY "HALT!"

Surely it is time, in cases of such a nature, that the

parties to these frauds, or those who buy the bonds—the fruits of these frauds—so heedlessly that they serve as a "fence," under the name and style of bona fide purchasers, should be taught that this court will furnish them no refuge, against the defeat of their schemes or the surrender of their ill-gotten gains.

These national courts have now amplified their jurisdiction, so as to practically require that all important questions shall come there for settlement; and it should be their boast, as that of some State courts (Mayor *v.* Gill, 41 Md., 395), that they will always maintain, "with jealous vigilance, the restraints and limitations imposed by law, upon the exercise of power by municipal and other corporations; and have never hesitated to exercise their rightful jurisdiction for the purpose of restraining them, within the limits of their lawful authority, and of protecting the citizen from the consequences of their unauthorized or illegal acts."

We ask this on the broadest grounds and in the interest of the whole public, for we believe that such laws are among the most powerful agencies, by which corruption saps the power of our people and of our government, and in them may lie hid the dark shadows of coming ruin.

V.

The Act of March 25th is Repealed.

If any power was granted to the Rockford road to deal with the municipalities named and described therein, by this Act of March 25, it was taken away again by the Act of March 26.

Thus construed, the two acts are flatly repugnant as to every municipality, which is common to them.

The Act of March 26 is the latest expression of the legislative will.

It is special, first, to this corporation; second, to the powers of this corporation, to take subscriptions from the municipalities; third, to the municipalities through which the road "shall run;" fourth to the amount they may take, fifth, to the amount they shall not take; sixth, to the election and the notice to be given.

In respect to the towns, in counties under township organization, the later act describes them with as precise and special language as the act of March 25; and in respect to the counties, the act of March 26 is special and not general, in describing them as the counties through which that road shall run.

In the latter particular the act of March 25 has, in the sense of the law in this canon of interpretation, giving force to special words, no advantage worthy serious consideration, as was heretofore shown; while in all other particulars, which are particular, in words that are special

in the highest sense, and contrasted with words that are general in the highest sense in the other act, the very contracts of this road with these municipalities, are regulated and restricted.

TEST THIS CONSTRUCTION BY EVERY CANON OF INTERPRETATION, AND IT WILL BE SEEN THE LAW OF MARCH 26 HAS THE ADVANTAGE, TO WIT:

It is the latest expression of the legislative will; it is special in its language; it is couched in negative terms; its powers are more restricted and guarded, and, hence, the rules that the debt-creating powers given to municipal corporations and the powers given to railways and other corporations are strictly construed, tell in favor of its provisions. Finally, and most decisive of all, it is in accord with the policy of the law, in respect to limited permission to municipalities to make such contracts; while its antagonist inaugurates a reign of license; and hence, all the rules of construction will be used by the court, to prevent the recognized mischief and support the remedy.

TO WHAT EXTENT DOES IT REPEAL THE POWERS CLAIMED BY THE ROCKFORD ROAD? WE ANSWER, TO EVERY EXTENT—ABSOLUTELY.

It includes every county named in the earlier act not under township organization; and every town in every county named therein under township organization; so far is too clear for denial. So far the repeal extends beyond cavil; that is, it extends to half the counties named (the court will take judicial notice of this, *i. e.*, whether counties are under township organization—

Rock Island *v.* Steele, 31 Ill., 543); and all the towns described; in short, to all the municipalities, it will be admitted, save four counties, perhaps, which are under township organization.

DOES THIS REPEAL EXTEND TO THESE FOUR COUNTIES?

This is the only question made, and when the matter is looked into carefully, considerately, by the court, it will be found that this act includes these counties.

1st. Look at the letter of the act. The language is: "That the County Courts, and the corporate authorities of cities and incorporated towns in counties not having township organization, and the corporate authorities of towns and cities in counties that have township organization."

The words "County Courts" begin the sentence, and are succeeded in the same sentence by the words "in counties that have township organization," as well as by the words "in counties that are not under township organization;" and in the eye of the law there is as much reason for these words being qualified by one as the other. It is a question, if a question at all, of intention, which requires us just here to consider a question of the collocation of words in a sentence. That there is nothing in the way of our construction, good sense and common understanding unite with authority to show.

Dwarris says: "Although the intent of the legislature is not to be collected from any particular expression, but from a general view of the *whole* of an act of Parliament, it is often material to attend to the collocation of words

in a sentence. When words are at the beginning of a sentence they may govern the whole. 2 Inst. 45; id. 18, "as *Nullus liber homo*,"—"all widows"—"*Ensement et en m'eme le manere*," etc. (See *post Mag. Char. Merton Glouc.*) When words are at the end of a sentence they may refer to the whole. 2 Inst. 50. Thus the words *per legem terrae*, in Cap. 29 of Magna Charta.

"But if the words are in the middle of a sentence (8, "B. & C., 94), and sensibly apply to a particular branch "of it, can they be extended to that which follows? "Agreeably to reason, and in grammatical construction, "it should seem not; but as statutes are read without "breaks and stops, it is not at any time clear that words "belong to any particular branch of a sentence; it must "be collected from the context to what they relate, and "they are often, as will be seen to be read distributively "—*reddendo singula singulis.*"

Again: Look at the title of the act: "An act to empower *county courts*, and the corporate authorities of cities and incorporated towns to subscribe," etc.

It says "*county courts*," not county courts in counties not under township organization, but all county courts.

The act, then, is one "to empower county courts to subscribe stock" in this company. That is its subject; and the court will not limit it to a class of counties. There are county courts in all counties, and there is nothing to forbid that they should fix the time for election, and make the proper order touching subscription. They are, as a rule, worthy of trust; they are elected by

the whole county, and could not be less worthy than the knaves or fools elected by towns, who have sometimes filled our Board of Supervisors. Indeed, looking at the history of the country, buried in these debts, it may well be doubted whether the sober and honest lawyer, who fills this place, might not be a better organ for the people, as he would be more certainly individually responsible, and might feel the danger of filling a nook in the jail.

The legislature did trust the county court, as we know, by the case of Supervisors of Schuyler County *v.* Rock Island & Alton R.R., 25 Ill., 185, and doubtless do in many cases; so that it cannot be held unusual; certainly not more unusual, than the extraordinary innovations of the act of March 25th.

The legislature, in the case of the remarkable adventurers who built this road, and disgraced, even abroad, the American name, and who were then about to raid these defenseless communities—the legislature may have deliberately preferred to trust some men who were not yet corrupted, and to trust the same class in all counties. At all events the legislature say so, and there is nothing absurd in what they say. The sound rule (over which we have spent so much time to show its extent and mode of application) so long adopted in the construction of statutes is, that if there is something to satisfy general words in them, and it would be contrary to public policy to apply them in the full extent of their generality, they will be taken to have been used in a restricted sense, finds no application in the construction of these statutes, except in our favor.

THERE IS NOTHING TO RESTRAIN THE GENERALITY OF T' ESE WORDS; BUT ON THE CONTRARY PUBLIC POLICY REQUIRES THAT THEY BE EXTENDED.

1st. It is consistent to apply it; for then all the municipalities along the line of this road are under one law. That was the spirit of the general railroad law. That was the spirit of the law of March 4. The distinctions—the arbitrary distinctions—of the act of March 25, as interpreted by our opponents, are alien to the policy of our general laws, to the policy prescribed for them along the road, in other laws, and alien to the genius of our people.

2d. Not to construe these words, county courts, as stated in the title and body of law, to extend to all county courts, is to impute to the legislature, not only capricious distinctions without reason, against policy, but distinctions that are unreasonable.

This act was meant to prohibit double subscriptions. Where is it needed most of all? The answer is plain enough, in counties under township organization, where there are the most numerous inferior municipalities; those of a class—were towns—agricultural communities, who never should have been trusted with this power to invest in railroad stock, to wit, to be robbed, and to rob each other—a class newly endowed with these powers, and likely, from their number, to abuse them—most of all in the amount of their subscriptions. To leave the county under township organization, to take what it chose, after this, was to establish a saturnalia of debt-making—debts never to be paid—illustrated well enough in this very case—where, under, or rather in spite of,

this law, as it reads, and as it must be construed, and as it certainly was meant to be construed, this company takes from the towns $123,000, and then takes from the county $200,000. So, while the road in the county is but *thirty-three miles* in length; and this law enforced, forbade the taking of more than $3,000 per mile, while the maximum subscription which the law-makers fixed for the communities, was about the old maximum, to wit: $100,000 per county—this company takes more than three times the legal maximum!

What is this court going to call this? We hope by some good Saxon phrase, and we hope to see it emphasized by a lesson, administered to the "fence" established by the brokers in our Eastern cities, which even they must heed, and may make such robberies a little less difficult. This is but a type of the tide of corruption sweeping over this country; and who shall interpose the veto entrusted to them by the people, but the courts? Let the people see that the national courts, which have been so much, so long used, to compel the keeping of the letter of every engagement put out by their agents—let the people see that in a proper case the courts are their friends, and are indeed ministers of justice for them as well as against them!

NOW HERE WAS A PLAIN MISCHIEF—INDISCRIMINATE SUBSIDIES — DOUBLE SUBSCRIPTIONS, — AND THIS LAW WAS AIMED AT IT. WHY SHOULD IT BE CONSTRUED CONTRARY TO ITS PLAIN LETTER—ITS READING, IN ORDER TO SUSTAIN THESE BONDS?

The law declares that such remedial statutes shall

be extended by construction. Dwarris (p. 614) says statutes are "extended by construction to other cases within the same mischief and occasion, though not expressly within the words," by the sound rule that, not the text or letter, but the "sense and spirit of an act, its scope and intention, are primarily to be regarded in the construction of statutes, * so that the object once understood," * "it matters not the terms used by the legislature in delivering its commands, * Judges are so to construe an act as to suppress the mischief and advance the remedy."

Whatever doubts may be entertained of extending the words of the statutes by equitable construction (says Dwarris) to embrace other cases—conveyances, times, places, persons and things—besides those contained and expressly mentioned in the act—there can be no question that words in a remedial statute are to be construed largely and beneficially so as to suppress the mischief and advance the remedy. "It is by no means unusual, in construing a remedial statute," say the Court in a late case (2 G. & J., 196), "to extend the enacting words beyond their natural import and effect, in order to include cases within the same mischief." Potter's Dwarris, 244.

This doctrine finds sanction in the following common law authority:

"Statutes are construed to prevent doubling of estates, which implies in itself deceit and private respect, to prevent the intention of Parliament.

"Hence the statute was construed so as to prevent the

doubling of estates which will be against the meaning of Parliament."

Heydon's Case, 3 Rep.; 8 Dwarris, 69.

But we desire to cite the court to a case directly in point, as it seems to us.

"The case of *Bechel, relator*, v. *Union Township*, 15 Ohio State R., 445, is a strong case much like this, as to the policy of the acts construed, and there the court refused to construe an act so "as to imply an intention to abandon a clearly expressed policy" against double subscriptions by counties and their towns to railroad companies. The court say:

"But it is claimed that the amendatory act of 1851 clearly authorized subscriptions both by a county and the township therein. But we do not so understand the provision of this latter act. The policy of withholding the power of subscription from townships, until a county subscription should have been declined or refused, is clearly manifested not only in the original charter of this company, but in other similar acts of incorporation passed about the same time. This amendatory act is not, therefore, to be so construed as to imply an intention, to abandon that clearly expressed policy, unless its terms manifest such an intention with at least reasonable certainty. Upon what conceivable ground could the policy rest of permitting double subscriptions in counties which had not theretofore subscribed and refusing such a privilege in counties which had already subscribed? That such a discrimination was intended is highly improbable."

THE TRUTH IS, THE COURT SHOULD LIMIT THIS LAW OF MARCH 25TH BY CONSTRUCTION OR BY REPEAL.

It can not be interpreted as it stands, without imputing to the legislature an intention they never could have entertained—abandoning the policy they had just declared, and that they were just declaring—the old time-honored, cherished policy of the State. Such an intention was against the temper of the time, the time of our new Constitution; for it was in 1870 when, by that instrument, our people prohibited forever all such contracts and legislation.

There must be a doubt, at least, whether such powers were granted; and in the language of our Supreme Court, in Mills *v.* St. Clair, 2 Gil., 235, this court may justly say: "WE MUST EITHER GIVE THE ACT THIS CONSTRUCTION OR DETERMINE THAT THE COMPLAINANTS' RIGHTS ARE WITHOUT LIMIT AND THEIR FRANCHISE BOUNDLESS, BOTH IN EXTENT AND TIME. THIS WE MUST DOUBT AT LEAST, AND SUCH A DOUBT, IF WELL FOUNDED, DETERMINES THE QUESTION IN FAVOR OF THE GRANTOR, THE SOVEREIGN POWER."

THE DECISION OF THE SUPREME COURT THROWS NO LIGHT ON THIS QUESTION.

It is said the Supreme Court of the State, in the suit of the people, gave color to the construction claimed by our antagonists.

But this is very far from the truth, as we understand it: the truth is, the Supreme Court had no occasion, as it declared, to pass on the question at all; it was enough

to know, that the provisions for election of the law of March 4 remained untouched by the law of March 25; and the court, finding that which, as far as it goes, was for our construction, that was decisive of the only matter which the court decided, viz: there was no valid election, and hence no authority to the Board to act.

Concessions to parties against whom the court is about to decide, and while deciding, and in a decision against them, are ex vi termini, obiter dicta. "Concede," the court say, "all you claim, and still this proceeding was unlawful."

What the court say in their opinion of the act of March 4th, as to the repeal by implication, our opponents formally admit to be indefensible—abandoning that ground. What the court say as to the act of March 26th is evidently a mere formality; and this would be clear beyond all question, had they added what the context shows, to wit: "This we shall concede for the purpose of the argument."

CONCLUSION.

Importance of these Cases.

The importance of these cases, as they really involve the validity of the entire issue of these bonds, coupled with perhaps a not inexcusable anxiety, has led to the length of this argument.

Briefly to review the points taken, we say:

I.

On July 2d, 1870, the county was not a subscriber to the stock of this company, because there is no satisfactory evidence that a subscription had in fact been made before that date, and because there was no law which gave its officers power to make a subscription in its name, until they were authorized by a vote of the people at an election pursuant to law; and no such election was ever held.

II.

After July 2d, 1870, the county never became a subscriber, not only because no subscription was, in fact, ever made after that date, but also because the Constitution abrogated the law under which alone it could be made, saving only the right to make a subscription where it had been authorized by a vote under existing laws prior to the adoption of the Constitution; and no such election was ever held.

How is the purchaser of bonds issued since the Constitution, to find out whether they were within this prohibition? By ascertaining that there was such a vote. Can he do this by looking only to the certificate or findings of the officers? *No*; to do so, would only nullify the Constitution, putting it in the power of officers to continue to issue bonds at their pleasure, having care only to ante-date the Constitution in their records or findings of such vote.

III.

The county had no power to subscribe $200,000 to the stock of the railroad company.

The act of March 4, 1869, amending the charter of this company, declares that it may contract its stock to a county through which it runs to the amount of "not exceeding $100,000."

This is all the power the company had to make any contract with this county.

First: The act of March 25, 1869, should not be construed to grant indefinite power to this company, for it was not meant for it at all.

Second: This act is besides void, because it was stolen through, under a title which did not indicate the part of the State affected by it, and confers powers upon many corporations; hence, it being a private and local law, violates the constitutional provision of Illinois, against log-rolling and omnibus legislation, viz.: "No private or local law shall contain more than one subject, and that shall be expressed in its title."

IV.

Briefly, to review the naked question of the effect of the suit of the taxpayers, we say:

The question is, which rule shall control,—that which protects commercial paper, or that which protects the decrees of courts?

On the one hand you shall not impeach the title of the holder of commercial paper buying it before maturity for value, unless you show it was taken *mala fides;* on the other, you shall not defeat the decrees of a court by bringing in any new party or by any new act. Public policy binds us to stand by both rules. The question is, where is the limit of either rule, and where is the line at which one rule ends and the other takes its place? and on which side of that line lies this paper?

The question has rarely arisen for decision whether the doctrine of *lis pendens* applies to commercial paper, but it has never come up for decision where the *lis pendens* arose before the birth of the commercial paper, and that paper is made, as well as negotiated, in defiance of it. Such a case is not a question of whether *lis pendens* can be predicated of commercial paper, but whether *lis pendens* controlling the contracts and powers of the parties, and having assumed control and mastery of the whole matter,—of the rights of parties, of the power of parties, of their relations, can be defeated by the act of parties, manufacturing commercial paper and issuing it for the very purpose of defeating the decree of the Court! Can the decree of a court be attacked, broken down and defeated by making paper, in form negotiable? This is a question certainly never yet decided in the affirmative.

Do public interests, public policy, the protection and encouragement of business, demand that such a conspiracy against justice shall succeed because it would be still worse in its consequences to say, that paper thus manufactured shall constitute an exception to the rule protecting commercial paper?

Shall the doctrine protecting the decrees of court be met by a fresh exception?

The question here, too, is whether the exception shall be established to injure innocent men, and possibly protect and shelter and benefit those who have defrauded them?

But the question here needs another circumstance to be added before it is fully presented—and that is, that this paper being issued in the name of a corporation, is necessarily issued in fact by the hand of some one claiming to be the agent of that corporation.

Hence a new problem. For here the suit is instituted by or on behalf—the same thing—of the real owners—the corporation de jure, against the corporation de facto and

its managers de facto, and impeaches and denies their right and power to issue this paper.

The purchaser of the paper must see that the agent issuing has the power to issue; and the question is not only, had this agent the power had there been no such suit, but granting this, had this agent the authority when his principal had withdrawn the power, and by his bill not only denied, withdrawn, but sought to stop the exercise of it.

This consequence hangs upon a decision in the affirmative, that the principal cannot protect himself. Here he never sent out the paper, nor authorized it, in fact, but sought to stop its issue, not only filing a bill, but seeking and asking an injunction. Nor would even the whole power of the court, added to that of the principal, serve to defeat the wicked scheme of the agent to ruin his principal, for the injunction issued and served could be broken, and the remedy would only be imprisonment for contempt, but would not defeat the paper.

Here then stands the problem: Can the *cestui que trust* be protected against his trustee, before he be removed as trustee, against the ruin which his issue of commercial paper would bring down? If not, then there is some justice in communism, in the iconoclasms of internationalists, in the extreme demands of the grangers, *et id omne genus!*

The law has gone too far in the interest of the capitalist and note broker; and the rights of the citizen, the tax payer, the shareholder, the laborer, have been struck down.

Here, too, these citizens and tax payers are not in fault in having elected the men who issue this paper; they were officers ready-made for them, given the power to issue this paper after they were elected to hold offices, to which no such power to issue bonds of this character attached; the people were simply victims, and had they

lain still, might have been blamed; but having acted promptly, fully, thoroughly, successfully, then is it true that their case was remediless—no power, no skill, no appeal to courts, could have averted this ruin? If so, it is, then, the fault, not of them, but of the law itself, and for that, the law, or the administrators of it if the law be falsely construed, must answer.

It would be too much to ask the highest diligence, the exercise and use of every engine known, of every arm in the arsenal of the law by the citizen; it is enough that he has sought justice where he should, and where it is given, in a court of ample jurisdiction; but we might fearlessly put this case to the highest test, and ask what more could he have done?

Remove the officers—the agent—how and on what ground? Not before the case was heard and they found in fault; and the lower court wrongfully found for them. The power of the de facto officers of the county, of the agents of the people—was taken away by the suit of the people. They were no longer held out to the world as agents; but by this suit to which they were made defendants, which was rightfully brought, they were then being stripped of their authority. All the world was bound to take notice, and could not deal with them except at their peril, or aid or permit them to waste, incumber or impair, or even change the trust funds, to which the *cestui que trusts* were asserting their rights.

This suit by one for all was, the only manner in which this could be done; it was the best mode in which it could be done; it was thoroughly and promptly prosecuted as the courts have decided.

The plaintiff asked for an injunction; he was entitled to an injunction, and was denied an injunction before this paper was issued.

The mischiefs thus seen to arise from upholding commercial paper, when made after suit brought, and in de-

fiance of the decrees of court, are strong motives for overruling such doctrine, and of stopping short and fixing a limit to the protection of such paper, of denying it protection, where it is the attacking party.

This doctrine of *lis pendens* is a rule, as Chancellor Kent and Lord Chancellor Manners have said, as all courts hold, which is of the highest value and importance, and "should not be frittered away," and to protect paper born after the bill is filed and made by a trustee who is defendant, against the will of the *cestui que trust* who is demanding that it shall not be made, is to establish a fresh exception—to extend the exception, and to extend it to cover a fraud. No interests of commerce are involved, for the question, it is seen, rarely arises. No case can be found in the books where the question came up and was decided adversely to the general rule.

When your predecessors in office, constituting the Supreme Court of the United States, in 1858, inaugurated the severe doctrine of "apparent power" of "special tribunal" in *Commissioners of Knox Co.* v. *Aspinwall*, 21 How., 542, they except this case.

The citizen, the stockholder, the party, the court, here intimate, may save himself by suit so brought. It is for your honors to follow this decision, and stop here also, to do a great act of justice.

GEORGE F. HARDING,

Attorney for the County of Warren.

IN THE

SUPREME COURT OF UNITED STATES,

OCTOBER TERM, 1877.

THE COUNTY OF WARREN, *Plaintiff in Error*,
vs.
GEORGE O. MARCY, *Defendant in Error*.
} No. 283.

THE COUNTY OF WARREN, *Plaintiff in Error*,
vs.
AUGUSTUS T. POST, *Defendant in Error*.
} No. 284.

BRIEF FOR DEFENDANTS IN ERROR.

CHARLES M. OSBORN,
OF COUNSEL.

CHICAGO:
Beach, Barnard & Co., Legal Printers, 104 Randolph Street.
1878.

IN THE

SUPREME COURT OF UNITED STATES,

OCTOBER TERM, 1877.

THE COUNTY OF WARREN, *Plaintiff in Error*,
vs.
GEORGE O. MARCY, *Defendant in Error*. } No. 253.

THE COUNTY OF WARREN, *Plaintiff in Error*,
vs.
AUGUSTUS T. POST, *Defendant in Error*. } No. 254.

BRIEF FOR DEFENDANTS IN ERROR.

CHARLES M. OSBORN,
OF COUNSEL.

CHICAGO:
Beach, Barnard & Co., Legal Printers, 104 Randolph Street.
1878.

The records in these cases present precisely the same questions. I have, therefore, prepared but the one brief, referring in it to the record in the Post case.

STATEMENT OF THE CASE.

These cases were tried in July, A. D. 1874, before Judges DAVIS, of this Court, and DRUMMOND, of the Circuit Court, (a jury being waived) and judgments were rendered in favor of the defendants in error, January 5th, 1875.

From the record (pp. 78 to 86 inclusive) it in substance appears: That the defendant in error brought suit on certain coupons, attached to bonds issued by the County of Warren. That the defendant in error bought the coupons sued on for value, before maturity, and without actual knowledge of their alleged invalidity, or of any suit in relation thereto.

That Aug. 23d, 1869, the Board of Supervisors of Warren County called an election, to vote for or against a subscription of two hundred thousand ($200,000) dollars, to the stock of the Rockford, Rock Island & St. Louis Railroad Company.

That the election was held Sept. 23d, 1869, and resulted in favor of the proposed subscription.

That the votes were duly canvassed, and on the 16th day of March, 1870, the Board of Supervisors of Warren County declared the result, and directed its chairman to

make the subscription. That the chairman of the Board did make the subscription.

That July 18, 1870, A. C. Harding filed a bill in chancery on the part of himself and all other tax-payers of Warren County, to enjoin the issuance of the bonds, alleging amongst other things, irregularities in the giving of notices of election, and it appears that some notices which should have been given were omitted, and others were not published for the full period of thirty (30) days before the election.

That a preliminary injunction was ordered and issued.

That this temporary injunction was dissolved by the Circuit Court of Warren County, on the 23d day of January, 1871.

That January 25th, 1871, the Board of Supervisors of Warren County ordered the clerk to issue the bonds and deliver them to the Railroad Company, in payment of said subscriptions.

That the clerk did so on the same day, and on that day the bonds were registered in the office of the County Clerk, and so certified to on each bond; and on the 27th day of January, 1871, they were registered with the Auditor of the State of Illinois, and so certified to by him, on each bond.

That on the 27th day of January, 1871, Harding prayed an appeal from the order dissolving the injunction, which appeal the Court refused to allow.

That Feb. 2d, 1871, the bill was dismissed by the Circuit Court on hearing, from which decision Harding appealed to the Supreme Court of the State of Illinois.

That in 1873, the Supreme Court entered a decree, reversing the judgment of the Circuit Court, and directing that Court to enter a decree, enjoining the issuance of the bonds.

A decree of this kind, in accordance with the mandate of the Supreme Court, was entered by the Circuit Court, after this suit was commenced and before trial.

The form of the bonds, shown by the record, (pp. 79 and 7, and 8) is as follows:

"UNITED STATES OF AMERICA.

"State of (Lithograph,) Illinois.

"No. .] County of Warren. [$1,000

"On the first day of July, in the year of our Lord, one "thousand eight hundred and ninety, the County of War- "ren, and State of Illinois, promises to pay to the Rock- "ford, Rock Island and Saint Louis Railroad Company "or bearer the sum of one thousand dollars and interest "thereon, at the rate of eight per cent. per annum, paya- "ble annually, on the first day of July in each year, on "presentation to the Treasurer of said Warren County of "the respective interest coupons which are hereto seve- "rally adjoined."

"This bond is issued in conformity with the vote of the "electors of said county, cast at an election held on the "twenty-third day of September, A. D. 1869.

"(On each margin), 1,000 dollars.

"(Across the face, in red), $1,000.

"In testimony whereof, and pursuant to the authority "granted by law, and upon the order of the Board of "Supervisors of said Warren County, passed at an ad- "journed session thereof, begun on the 25th day of Janu- "ary, A. D. 1871, I, clerk of the County Court of said "county, have hereunto signed my name as such clerk, "and affixed the seal of said County Court, this 25th day "of January, A. D. 1871.

" { Seal Warren County, } W. G. BONE,
" { Illinois, Court. } *Clerk of the County Court,*
" *of Warren Co.*

"[U. S. Internal Revenue Stamp].

"(Across the face of the stamp, in red): County of "Warren, Jan. 25, 1871."

NOTE: *I have omitted a statement of some of the findings, which seemed to me of no importance.*

So much of the several acts of the Legislature, as are necessary to place before the court the questions supposed to be involved, are as follows:

THE ACT OF MARCH 4TH, 1869.

An act to amend an act, entitled: "An Act to incorporate "the Rockford, Rock Island & St. Louis Railroad Com- "pany," approved March 4th, 1869:

"SEC. 6. Any incorporated city, or any town, village "or county, through which said railroad may pass, or "which may be situated on, or near the line of said rail- "road, may subscribe to the capital stock of said company, "any sum not exceeding one hundred thousand dollars, "and may issue bonds in denominations of not less than "one hundred dollars, with coupons for the interest "properly attached, bearing interest at any rate not ex- "ceeding ten per centum per annum, payable annually, "which bonds may run any period not exceeding thirty "years, to be determined on by the county court, board "of supervisors, city council, town trustees, or other, the "legal and proper authorities authorized to issue said "bonds: Provided, that before said stock shall be sub- "scribed, an election shall be held, in conformity to the "laws in regard to ordinary State, city, county, or town "elections, thirty days' notice first having been given by "publication in at least one newspaper in the county, and "six public notices, printed or written, having been posted "in six of the most public places therein, during the time "above named, and returns to be made in the usual way; "at which election, a majority of the legal voters, voting "on the question, shall have voted in favor of said sub- "scription."

Private Laws of 1869. Vol. 3, p. 342.

Act of March 25th, 1869.

"*An Act to authorize certain counties and towns therein named, to subscribe stock in railroad companies:*"

"Sec. 1. Be it enacted by the People of the State of "Illinois, represented in the General Assembly: That "the counties of Rock Island, Mercer, Warren, McDonough, "Schuyler, Cass, Scott and Greene, and the several towns "of such of said counties as have adopted township or- "ganization, be, and they and each of them hereby are "authorized and empowered, to purchase or subscribe for "shares of the capital stock in any railroad company, "already organized, or hereafter to be organized, which "passes in whole or in part through the said counties or "towns, or any or either of them, to such an amount as any "of the said counties and towns, or either of them, shall "determine and deem best and proper; and the stock so "purchased or subscribed for, shall be under the control "of the corporate authorities of the counties or towns "making such subscription, in all respect as stock owned "by individuals.

"§ 2. Subscriptions to the capital stock of any such rail- "road company may be made by an agent, appointed by the "board of supervisors, in counties that may adopt town- "ship organization, by the county court, in counties that "have not adopted township organization, on behalf of said "counties, and by the town auditors of any town, when such "subscription is made by a town, upon such terms and con- "ditions as the corporate authorities of any such county, "or the town authorities of any such town may prescribe: "and for the payment of such stock so subscribed or pur- "chased, the board of supervisors of such of said counties "as have or may adopt township organization, the county "courts of such of said counties as have not adopted "township organization, and the town auditors of any

"such towns making such subscriptions or purchase, are "hereby authorized and empowered to borrow money at "a rate of interest not exceeding ten per cent. per annum, "or such counties and towns may pay for the same, in the "bonds, orders or warrants of such county or town, to be "drawn for that purpose in sums of not less than one "hundred dollars, to run not exceeding twenty years, "bearing not exceeding ten per cent. interest per annum, "payable annually, and the faith of any such county or "town shall be pledged for the annual payment of the in- "terest upon such bonds, orders or warrants, and for the "ultimate [payment] of the principal of the same.

"§ 3. The railroads already incorporated, or that shall "hereafter be incorporated by any law of this State, pass- "ing in whole or in part through any of the said counties "or towns, are hereby authorized to receive the bonds, "orders or warrants of any of said counties or towns, "in payment of the capital stock of such company, "at par, in lieu of cash, and to dispose of them as "they may think proper and best, for the purpose of con- "structing such roads or equipping the same.

"§ 4. All such bonds, orders or warrants of any of "said counties shall be issued by the clerk of the county "court, under the seal of this [his] office, upon the order of "the county authorities; * * * * * and "upon issuing any such bonds, orders or warrants, the "county clerk, or town clerk, as the case may be, shall "make registration thereof in a book to be kept for that "purpose in his office, showing the date, the amount, "number, time of maturity, and rate of interest of such "bond, order or warrant; * * * * * and "such clerk shall certify under the seal of his office on "such bond, order or warrant, whether issued by the "county or town, the fact of such registration, for which "he shall receive such fees as shall be allowed by the board "of supervisors, or county court of such county."

Sections 5, 6 *and* 7 *provide for the levying and collecting of taxes, for the payment of such bonds when issued.*

"§ 8. Any officer who shall willfully refuse or neglect "to perform any duty required of him under this act, "shall be liable to indictment, and upon conviction shall be "removed from office, and fined in any sum not exceeding "one thousand dollars."

§ 9 *provides a limit for the levy of the tax.*

"§ 10. No subscriptions to stock shall be made by any "of the counties or towns herein mentioned under the "provisions of this act, unless the same is submitted to a "vote of the people of such county or town, as the case "may be, and unless the same shall receive a majority of "the votes cast upon such question at such election. Such "question shall be submitted in such manner as the "county authorities may determine as to the county, or as "the town auditors may determine as to the town.

"§ 11. All elections hereafter to be held in any of the "said counties or towns, in relation to subscribing to "the capital stock of any railroad company, a majority of "the votes cast at such election shall determine the ques- "tion thus submitted and passed upon, any law heretofore "enacted to the contrary notwithstanding." Approved March 25, 1869.

Private Laws of 1869, Vol. 3d, p. 368.

The Act of March 26, '69.

"*An act to empower county courts and the corporate au- "thorities of cities and incorporate towns to subscribe to the "stock of the Rockford, Rock Island and St. Louis Rail- "road.*"

"Section 1. Be it enacted, by the people of the State "of Illinois, represented in the General Assembly: That "the county courts, and the corporate authorities of incor-

" porated towns and cities, in counties not having township " organization, and the corporate authorities of towns and " cities in counties that have township organization, be and " are hereby authorized and empowered, if the Rockford, " Rock Island and St. Louis Railroad shall run through " any part of said county or counties, to subscribe to the " stock of said railroad, not to exceed three thousand dol- " lars per mile for the distance said railroad traverses said " county, and not exceeding the sum of ten thousand dol- " lars for every thousand inhabitants, when the subscrip- " tion is made by the corporate authorities of cities or in- " corporated towns : *Provided*, such subscription may be " increased to an amount not exceeding five thousand dol- " lars per mile, by consent of the majority of the legal " voters of such county, city or town, signified either by " petition or an election for the purpose :

" *And provided, further :* That no such subscriptions " shall be made by the corporate authorities of any county, " city, township or town, until the question of making such " subscription shall have been submitted to a vote of the legal " voters thereof, at a general election or a special election, " to be called for that purpose; and no such election shall " be held until at least thirty days' notice of such election " shall be given in the manner now provided by law, such " notice to specify the amount of such proposed subscrip- " tion.

" SECTION 2. The bonds of any municipal corporation " so subscribing stock, may be issued and negotiated in " payment of such subscription, at par." * *

Private Laws of 1869, Vol. 3, p. 365.

A very full statement of the final opinion of the State Supreme Court, in the Harding case, above referred to, is as follows :

Abner C. Harding v. *The Rockford, Rock Island and St. Louis Railroad Company, et al.*, 65 Illinois Reports, p. 90.

Opinion by THORNTON, J. :

" This bill was filed to enjoin the county of Warren from " issuing its bonds in aid of the railway company.

" An injunction was issued, which was dissolved, and a " decree was rendered, dismissing the bill, and awarding " damages against the complainant to the amount of " $13,000.

" The county had no authority to issue bonds to the rail- " road company until the question had been submitted to " the legal voters of the county, in conformity to the law, " and been sanctioned by them.

" There was an election, and the majority of the voters " voted in favor of subscription ; but thirty days' notice of " the election was not given, either by publication in a " newspaper, or otherwise.

" The only question we propose to consider is, was the " omission to give notice for thirty days fatal to the right- " ful exercise of the power to issue the bonds ?

" If any general or special statute which controlled the " election required the publication or posting of a notice for " thirty days prior to the holding of the election, and this was " not done, then the election was invalid, and the expression " of the will of the voters thus obtained conferred no power " upon the board of supervisors either to make the sub- " scription or to issue the bonds.

* * * * *

" If the mode prescribed for carrying into effect the " right to issue bonds is not complied with in all material " matters, then the bonds should not be issued.

* * * * * *

" There were three acts passed at the same session of the " legislature, which have some reference to the issue of bonds " in aid of the construction of this railroad. *It is, however,* " *strenuously urged that the act of March 26th, 1869, is not* " *applicable to the election and proceedings in the county of* " *Warren; and that this county is carefully excluded from* " *the provisions of the act. This we shall concede.*

"The other two acts are of the dates, respectively, of "March 4th and March 25th, 1869. The first is an act "amendatory of the charter of the railroad company. The "other is 'An Act to authorize certain counties and towns, "therein named, to subscribe stock in railroad companies'; "and it authorizes the counties of Rock Island, Mercer, "*Warren*, McDonough, Schuyler, Cass, Scott, and "Greene, only, and the several towns therein, to subscribe "to the capital stock of any railroad company, when the "road should pass in whole or in part through them.

"Though the act does not name the railroad company, "which was made a defendant to the bill, yet we gather "from the record that the defendant company does run its "road through these counties, and that the bonds, the issue "of which was enjoined, are for its benefit, and that it claims "them by force of the provisions of the act of March 25th, "and the election which, it is insisted, was held under it.

"The stress of the argument in behalf of the railroad "company is, that the several provisions of the act of March "4th, in relation to subscription to the capital stock of the "company, an election, and the issue of bonds, are re-"pealed by the later act, and that, therefore, the act of "March 25th must control as to the requisite notice of the "election. * * * * * *

"Is, then, the proviso to section 6 of the act of March 4th, "(Vol. 3, Pri. Laws 1869, p. 343) as to the notice of the "election, repealed by section 10, of the act of March "25th, (Vol. 3, Pri. Laws, 1869, p. 370.)?

"The first act prior to subscription, required an election "in conformity to the laws in regard to ordinary State, "county, city or town elections, and notice to be given of "it for thirty days. Section 10 of the later act also required "an election on the question of subscription, and concludes "as follows: 'Such question shall be submitted in such "manner as the county authorities may determine as to "the county, or as the town auditors may determine as to "towns.'

"According to both acts, the denomination of the bonds "to be issued was not to be less than one hundred ($100) "dollars, and to bear interest not exceeding ten per centum "per annum; but in the first, the amount of subscription "was limited to one hundred thousand ($100,000) dollars "by any county, town, etc., and in the later act the amount "was unlimited; and in the one, the period for which the "bonds might run, was thirty (30) years, while in the "other, the period was only for twenty years.

"What was the mischief intended to be remedied by the "subsequent enactment? What change was evidently "made?

"The evils, manifestly intended to be removed, were the "limitation imposed as to the amount of the subscription, "and the time for the maturity of the bonds, as provided "in the act of the 4th of March.

"From a close analysis of the two acts it is apparent "that the amount of subscription to be voted upon was to "be left unrestricted, and that the bonds should mature "in at least twenty (20) years.

"To this extent, there is a palpable repugnancy between "the two enactments, and a repeal of the inconsistent pro- "visions contained in the former act by necessary implica- "tion. But the question, as to the repeal of the provision "for a notice of the election, is altogether a different one.

* * * * * * *

"We are of opinion that the proviso to section six (6) of "the act of the 4th of March is not abrogated by section "ten (10) of the subsequent act. Their reconciliation, in "the manner we have attempted, will best subserve the "public good; and the validity of both, thus reconciled, "will make the legislation more in accordance with "reason, shield the legislature from an absurdity, and "prevent serious consequences.

"As the election was invalid for want of sufficient notice, "there was no power to make the subscription, and none "was conferred by the vote to issue the bonds.

"The decree dissolving the injunction and assessing "damages against the complainant, and dismissing the "bill, is reversed, and the cause remanded, with directions "to grant the prayer of the bill."

This opinion was rendered in 1873, *as appears by the record, p.* 83.

ARGUMENT.

To save the time of this court, I have cited very fully from the opinion of the Supreme Court of the State of Illinois in Harding's case. Many of the questions which the counsel will attempt to argue in this court have been passed upon by the State Court in that opinion; and so far as they relate to the construction and validity of the statutes involved, the opinion, though rendered long after the bonds in question were issued, will be considered with great respect by this court, though not, perhaps, absolutely binding upon it I conceive that this case may be decided without in any way overturning the points passed upon by the State Court in that opinion.

The Case for the Defendant in Error.

I claim that the power to issue the bonds was given by the act of March 25th, above cited.

It will be observed that this act gives to Warren County, by name, power to subscribe to and issue bonds to such an amount as it shall determine to be best and proper, in payment for the capital stock of any railroad company already organized, or hereafter to be organized, which passes in whole or in part through the said county; and that it gives to such railroad company the power to receive such bonds in payment for its capital stock.

The language of this act is certainly broad enough to give the power to this county to subscribe for the stock of this road, and issue bonds in payment of its subscription.

Its road passed through the county, within the meaning of the act, before the subscription, as it actually did after that time.

County of Calloway v. *Foster*, 93 U. S., 567
Commissoners, &c., v. *Thayer*, 94 U. S., 631.

The bonds were to issue on the order of the Board of Supervisors, (act March 25, §§ 2 and 4), and they were issued upon such order, as is shown by the recitation of the bonds, (Record, pp. 7, 8, and 79), and by the finding of the court, (Record, p. 79).

Only one condition was imposed upon the exercise of this power, viz: that at an election the subscription to the stock should be authorized by a majority of the people voting Such an election was held, and a majority of the people voted for such subscription.

This is also shown by the recitation of the bonds, (Record, pp. 7, 8, and 79), and by the finding of the court, (Record, p. 80), it was held, September 23, 1869, almost a year before the new constitution took effect, and therefore was not affected by the separate section of that constitution, which provides: "That the adoption of this article (pro-"hibiting municipal aid to corporations), shall not be con-"strued as affecting the rights of any such municipality to "make such subscriptions, where the same shall have "been authorized under existing laws, by a vote of the "people of such municipalities prior to such adoption."

It is to be gathered from the act, that the determination of the fact of the election, and of its result, was left to the county authorities. (*Act of March 25, 1869, §§ 1, 2, 4, and 10.*) In the case of counties under township organization — the Board of Supervisors. (*Statutes of Illinois, 1869, Gross, pp. 756, and 757, Chap. 103, Art. 13, § 4; Art. 14, § 6.*)

On the 23d day of August, 1869, the Board of Supervisors, by its order, submitted this question to the people. (Record, p. 80.) On the 16th day of March, 1869, the vote having been canvassed by the clerk, the Board declared the result in favor of the subscription, and ordered the subscription. (Record, p. 81.)

On the 25th of January, 1871, the Board ordered the bonds to be issued and delivered in payment of the subscription theretofore made. (Record, p. 79.)

The result of the election, the time when it was held, and the order of the Board to issue the bonds, are recited in the bonds.

The court has specifically found that the defendant in error was a holder of the coupons for value before maturity, and without actual notice of their alleged invalidity, or of any suit in relation thereto. (Record, p. 78).

Under these circumstanaes the ruling of this court from the time of the decision of *Knox County* v. *Aspinwall*, to the present time, has been that these records of the Board of Supervisors, and these recitations in the bonds, estop the county from asserting that the facts were not as stated therein, or that the election was not regularly notified or conducted.

And the estoppel by recital made after the new constitution was adopted, is as perfect as if made before.

County of Moultrie v. *Savings Bank*, 92 U. S., 637.
Town of Coloma v. *Eaves*, 92 U. S., 484.

If anything further is necessary, we might call the attention of the court to the fact that the bonds were registered not only under the Act of March 25th, but also by the Auditor of the State of Illinois, where, as in the case of the *Town of Coloma* v. *Eaves*, just cited, it was requisite that an affidavit should be filed, that all the conditions precedent provided by law had been complied with. I understand that the doctrine of this court is, that when the power to issue the bonds existed and was exercised, innocent holders of the bonds for value will be protected, notwithstanding any irregularities that may have occurred in the exercise of that power.

I understand it to be equally well settled in this court,

that when, (as in this case) the determination of the facts as to whether or not the conditions upon which the right to exercise the power depends have been performed, has been left to the officers or the board, which is to issue the bonds, that their decision (certainly when expressed and probably when to be implied from their action) will be treated as an estoppel, and as final against the municipal corporation, in favor of the innocent holder of the bonds.

It would be mere affectation on my part to cite the cases in which these doctrines have been announced and repeated. From the time of the decision of the case of *The Commissioners of Knox County* v. *Aspinwall, et al.*, 21 How., 539, to the present time, the decisions present substantially an unbroken line, and this course of decision has become a rule of property, generally understood and relied upon, and which this court will not be likely now to overturn.

In this case there is no charge of fraud or intentional wrong made against the officers of the county, or those of the railroad company. The only cause of complaint (except the constitutionality and applicability of certain statutes) is that stated by the Supreme Court of this State, viz: that the election was not notified for the full period of thirty days, and this was, (as has been decided over and over again by this court), a mere irregularity in the exercise of the power; of this the record provided by law gave no notice, and of this, (as is found by the court below) the holders of the bonds had no notice.

The law authorizing the issue, was passed in 1869, so that the legislature had before it the course of decision in this court, holding that the owners of bonds should not be charged with such irregularities and also the like holding of the Supreme Court of the State of Illinois in

Johnson v. *Stark County*, 24 Ills., pp. 90, 91.
and *Prettyman* v. *Tazewell County*, 19 Ills., p. 414.

And if it had desired to charge the holders of bonds with notice of such irregularities, it is to be presumed that it would have inserted some provision as to the form of the bonds or otherwise, which would have effectuated the purpose. Not having attempted any such thing, I have the right to say that the legislature intended that the bonds so issued should be negotiable paper, and should pass from hand to hand, free from all equities to which they might be subject in the hands of the original parties. I shall therefore confine my argument to an answer to such matters as I have reason to believe will be urged, and which are supposed by counsel either to affect the power to issue the bonds, or to constitute constructive notice to the purchasers of the bonds, of irregularities occurring previous to their issue.

The Harding Case.

It will be observed that the case of Harding against the railroad company, above cited, arose before the bonds issued; that its object was to prevent the issuance of the bonds, and that the decision in that case, adverse to their issue, was not made until the bonds had been issued for more than two years; that the parties to that suit were only the parties interested in the question of whether or not they should be issued; that the Supreme Court of Illinois had no knowledge, at least no official knowledge, that they had been issued; that they do not attempt to decide that the bonds, if issued and in the hands of innocent purchasers, would be void, but only that, as between the railroad company and the tax-payers of the county, they ought not to issue because an irregularity in the time of giving the notices of election had occurred.

No question of estoppel, no question of the rights of purchasers were before it, or were attempted to be decided; indeed, no parties were before it, between whom such questions could arise.

In that suit, the railroad company was contending that the law of March 25th had been substantially complied with, and the Supreme Court holds, that the Legislature intended that the provision of the law of March 4th, directing notices of election to be published for thirty days, is to be treated as incorporated in the law of March 25th, and that notices of the election not having been published for the full period of thirty days, this provision of the law was not complied with, and therefore, in the language of that court, "as the election was invalid for want of suf- "ficient notice, there was no power to make the subscrip- "tion, and none was conferred by the vote to issue the "bonds."

It would be doing the Supreme Court of Illinois an injustice to assume that it would have decided the bonds void in the hands of an innocent purchaser for value, on the same state of facts, in the face of the decisions in *Johnson* v. *Stark County*, and *Prettyman* v. *Tazewell County*, above referred to.

All questions concerning the constitutionality of the laws involved, and their relation to the then proposed issue of bonds, were fully presented to, and fairly before that court, and as that court must be more familiar than this court can be, with the construction heretofore given to the State Constitution, and with the system of township organization in force in Illinois, I claim that its decision should, except against overwhelming reason to the contrary, guide this court upon the following points:

First. That the act of March 25th, 1869, is constitutional.

Second. That the act of March 25th, 1869, was intended to grant power to Warren County to subscribe to the stock of the Rockford, Rock Island and St. Louis Railroad Company, to such an amount as it should see proper.

Third. That the act of March 26th, 1869, did not refer to counties under township organization, and therefore did not relate to Warren County, or in any manner affect any questions concerning the issuance or validity of these bonds.

The Constitutionality of the Act of March 26th, 1869.

Section 23, of article 3, of the constitution of Illinois, of 1848, in force when this act was passed, provided that "No "private or local law, which shall be passed by the Gen- "eral Assembly, shall embrace more than one subject, "and that shall be expressed in its title."

The title of this act is:

"An Act to authorize certain counties and towns therein "named, to subscribe stock in railroad companies."

And the very first lines of the first section of the act enumerate the counties of Rock Island, Mercer, *Warren*, McDonough, Schuyler, Cass, Scott and Green, as the counties to which the act was to apply.

This act embraces but one subject, and that is the question of subscribing or not subscribing to the stock of railroad companies passing through the eight counties named in the first four lines of the act, and this is fully expressed in the title of the act. To be sure, the counties are not named in it, but the object and purpose of the act are fully set out; and this makes the title as constitutionally complete as those which were held sufficient by the Supreme Court of the State of Illinois, in the following named cases:

The Belleville, &c., R. R. v. *Gregory*, 15 Ills. R., p. 29.
Erlinger v *Boneau*, 51 Ills. R., p. 94.
Ottawa v. *The People*, 48 Ills. R., p. 238.
Supervisors, &c. v. *The People*, 25 Ills. R., p. 183.

This case seems to me decisive of this point made against the act of March 25th. The act was entitled "An Act to incorporate the Rock Island and Alton Rail-"road Company."

And the act authorized certain counties and towns along the line of the proposed road, to subscribe to its capital stock. The court held that the title of the act was sufficient to embrace the whole of the law, and that it was a compliance with the constitutional requirement in that regard.

I have copied the above from an argument filed in the Harding case, by the lamented Hon. Samuel W. Fuller, now deceased, because it seems to me concise and complete.

I submit that this Court will not, on this subject, overturn the decision in the Harding case. It is true that the State Court does not mention the point in the opinion, but I have no doubt that counsel for plaintiff in error will admit that it was very fully argued before the State Supreme Court in that case, for no one can know the fact better than he. In any event, it appears that the Court had the law, thought to be unconstitutional, before it, and construed it, recited the title now called in question in its opinion, and treated it as constitutional.

I conclude, therefore, that the act of March 25, 1869, on which we rely, is not unconstitutional.

THE ACT OF MARCH 25, 1869, GIVES AUTHORITY TO WARREN COUNTY TO SUBSCRIBE FOR STOCK IN THE ROCKFORD, ROCK ISLAND AND ST. LOUIS RAILROAD COMPANY.

As already stated, defendant in error claims that the power to make this subscription to the capital stock of the railroad company was conferred on Warren County by the act of March 25, 1869.

The act gives Warren County the power to issue its bonds for the stock of "*any railroad company already organized* "*or hereafter to be organized*, which passes, in whole or in "part, through that county, to such an amount as the said "county shall determine, and deem best and proper."

That the railroad to whom these bonds issued ran through this county is not disputed; and it is evident that the language of the act is sufficiently broad to authorize this subscription.

But it will be contended that because, by the amended charter of the railroad company, known as the act of March 4, 1869, (one section of which is above cited), the power is granted to all the counties along the line of the road to subscribe to the capital stock of this company to an amount not exceeding the sum of one hundred thousand dollars, and because none of the railroad companies to whose stock subscriptions might be made under the act of March 25th, are expressly named in that act; and because these acts were passed at the same session of the legislature, the intention of the legislature is shown that the act of March 25th should not apply to subscriptions to this railroad company. The position taken by counsel in the court below, and in Harding's case, was, that these acts being passed at the same session of the legislature, are to be construed as one act, and will harmonize only by making this Rockford road an exception to the general language, "any railroad."

Plaintiff in error offered evidence, and procured findings to show that these acts were reported to the House of Representatives from the committee to whom they had been referred the same day, and counsel will infer therefrom that the amendment to the charter became a law first, only by accident; but it does not occur to me that this fact, if established, will in any way aid the court in the construction of these two laws.

The fact remains that the act of March 25th became a law after the act of March 4th, and if any question of repeal is involved, the provisions of the act of March 25th, conflicting with the act of March 4th, effect the repeal of such provisions, certainly the act of March 4th does not repeal any provisions of the act of March 25th.

If continued as sections of one act, as counsel has always contended, the two combined would be held to mean just what they say, viz: Any county along the line of the Rockford Road, may subscribe, to an amount not exceeding $100,000, but Warren County may subscribe to this or any other road, such sum as it shall determine to be best and proper.

If a precedent is needed for construing the words of statutes according to their natural meaning, it will be found in the case of

Robertson, et al. v. *City of Rockford, et al.*,
21 Ill. R., p. 451.

There the charter of the city prohibited the city from borrowing money beyond a certain limit. The charter of a railroad company authorized the cities through which it should be located to lend credit to the railroad company, without specifically naming the cities. Though the proposed subscription exceeded the limit fixed by the charret of the city, the Supreme Court sustained the proposed subscription as the last expressed will of the legislature.

In the Harding case it will be seen that the Supreme

Court of the State expressly passes on this question. On pages 95 and 96 of the opinion, the court says: "From a "close analysis of the two acts, (the acts of March 4th and "of March 25th,) it is apparent that the amount of sub- "scription to be voted upon, was to be left unrestricted, "and that the bonds should mature in at least twenty years. "To this extent there is a palpable repugnancy between "the two enactments, and a repeal of the inconsistent "provisions contained in the former act by necessary "implication."

The whole of the opinion of the court in the Harding case, is based upon its finding that the act of March 25th did give the county of Warren authority to make this subscription, and that the action of the county was had under this act, and that it was properly so had.

To hold that the act of March 25th did not give authority to subscribe to the Rockford Railroad, would have been to ignore the plain words of the law giving power, "to pur- "chase or subscribe for shares of the capital stock of any "railroad company already organized, or hereafter to be "organized, which passes in whole or in part through the "said counties," and this that court did not do. The court decides, on the contrary, that the whole proceeding was had under the act of March 25th, which, as they in substance concede, constituted an entire code of proceedings, except as to the time for which the election was to be notified: That in respect to this time, the words of the act providing for its submission, "in such manner as the "county authorities may determine," did not necessarily control the question of the time for which the election should be notified, and that they therefore would hold that in compliance with the practice of the legislature in many other cases, especially it having provided for thirty days notice by the acts of March 4th and March 26th, and the general law as to corporate subscriptions, it intended that thirty day's notice should be given for an election under this law of March 25th.

I do not think it necessary to make further argument, or to cite authority to induce the Court to construe express words according to their plain meaning, especially when the State Supreme Court has already passed upon the question and found authority for the issue of the bonds in this act of March 25th.

The Act of March 26, 1869.

The act of March 26, 1869, does not repeal the provisions of the act of March 25, 1869, granting power to Warren County to make subscriptions to the capital stock of this Railroad Company.

It was contended in the Harding case, and in the court below, that the act of March 26th, above cited, limited the subscriptions which might be made to this road, to three thousand dollars per mile, and superseded or repealed the act of March 25th. The answer to this position is, that the express words of the act of March 26th carefully limit its application to counties not under township organization. That while perhaps the power exists to make the county court the financial agent of a county under township organization, it is very unusual and extraordinary to do so, and therefore that the implication from the provisions of the act of March 26th, independently of its express words is, that it was not intended to apply to counties under township organization. That Warren County being under township organization (of which the Court takes judicial notice—*The County of Rock Island* v. *Steele*, 31 Ills., 543), this act of March 26th does not apply to it.

The mere reading of the title, and the first section of the act, seems to me a sufficient argument.

"An act to empower County Courts, and the corporate "authorities of cities and incorporated towns, to subscribe "for the stock of the Rockford, Rock Island and St. Louis "Railroad."

"SECTION 1ST. Be it enacted by the people of the State "of Illinois, represented in the General Assembly: That "the County Courts, and the corporate authorities of cities "and incorporated towns, in counties not having township "organization, and the corporate authorities of towns and "cities in counties that have township organization, be "and are here by authorized and empowered, &c."

It is difficult to conceive of words more carefully chosen to exclude from its operation counties under township organization. It is certainly unnecessary to multiply words on this matter, where the language of the act is so plain, and where the Supreme Court of the State has, after full and repeated argument, expressly decided the point, in the language following :

"There were three acts passed at the same session of "the legislature, which have some reference to the issue "of bonds in aid of the construction of this railroad. It is, "however, strenuously urged that the act of March 26, "1869, is not applicable to the election and proceedings in "the county of Warren; and that this county is carefully "excluded from the provisions of the act. This we shall concede."

Harding v. *Railroad Co.*, 65 Ills., p. 92.

I shall assume that the act of March 26th has no relevancy to the question in issue.

THE SUBSCRIPTION.

It will be observed that the bonds were issued after the State Constitution of 1870 went into effect.

One of the sections of that constitution which was separately submitted, forbids all subscriptions by municipal corporations to the stock of railroad companies, except such as "have been authorized under existing laws, by a "vote of the people of such municipality prior to the adop-"tion of the constitution."

I understand that it will be contended in argument, that because, since the issue of the bonds the Supreme Court of the State of Illinois has decided that the election which was held September 23, 1869 (Record, pp. 61 and 62), was irregularly advertised, it cannot be said that the subscription had been "authorized under existing laws by a vote "of the people," and that therefore the subscription was without authority of law.

Admitting for the argument that no subscription was made before the new constitution took effect, we have the same question presented which occurs in all these cases, viz: whether irregularities in the exercise of the power, unknown to the holder of the bonds when he purchased, shall vitiate the power, or whether the recitals contained in the bonds shall estop such a defense.

The law provides for this election, and that it be properly notified, and between these parties this court says that the fact of compliance with the law is conclusively proved by the recitations contained in the bonds.

The constitution is but law, and the provision contained in that; no more affects the question of power, than that contained in the act of the Legislature; and this would be true if the constitution had expressly provided for a notice of the election, or a particular time of notice, which it has not done. These recitals estop the county, though not made until after the constitution was adopted.

County of Moultrie v. *Savings Bank*, 92 U. S. R., 637.

Town of Coloma v. *Eaves*, 92 U. S. R., 484.

The constitution says that no subscription should be made, unless previously authorized by a vote of the people. The Record of the Board of Superisors shows that this subscription was so authorized. The bonds recite that it was so authorized. The certificate of registry shows that an officer of the county must have sworn that it was so

authorized. The fact is that it was so authorized, (unless this irregularity of notice avoids it).

Relying on the representations, defendant in error bought the bonds, and he had no notice of any claim of irregularity, much less of any irregularity existing in fact.

County of Moultrie v. *Savings Bank.*
Town of Coloma v. *Eaves.*

I respectfully submit, that these facts estop the county from showing that irregularities occurred in notifying the election, even if no subscription had been made until after the passing of the new constitution.

I further submit that a subscription was in fact made in March, 1870, which was before the new constitution was adopted.

The court's finding (Record, p. 58), says that the bonds were "delivered by said clerk, as directed by a majority "of the board, to the Rockford, Rock Island & St. Louis "Railroad Company, in payment of a subscription of a "like amount to the stock of said company, which pur- "ported to be made in March, 1870, in the name of said "county, by the chairman of said board, in pursuance of "an order of said board, as hereinafter stated."

(Record, p. 59): "On March 16th, 1870, the said board "(of supervisors), declared that the election had resulted "in favor of the subscription, and ordered David Turnbull, "their chairman, to subscribe two hundred thousand dollars "to the stock of said company." We have here a finding that a subscription had in fact been made; and all the facts indicate that it was made shortly after the order to do so—in other words, when it purported to be made.

Counsel now contends that the production of a subsciption from the proper source, bearing date in March, 1869, does not prove that the subscription was then made. I will only say that in the absence of any other evidence, I understand the presumption to be that it bears the date on which it was made.

The Sixth Plea.

Counsel not having assigned errors upon the sustaining of the demurrer to his sixth plea, I will not occupy the attention of the Court by examining it.

The Doctrine of Lis Pendens.

When these bonds were issued, there was pending in the Circuit Court of Warren County, Illinois, the suit in which A. C. Harding, as a tax payer, was plaintiff, and the county authorities, and the railroad company, were defendants, which sought to enjoin the issue of bonds, on the ground, (amongst others), that the election was not advertised in the newspapers of Warren County for the full period of thirty days, and that some of the notices which should have been posted were not posted. A preliminary injunction had been issued, and remained in force for a time. It was dissolved by the court, before whom the cause was pending, before these bonds were issued. After they were issued, duly registered by the Auditor of State, delivered to the railroad company, and probably sold by it, to innocent purchasers, a decree was entered in that cause dismissing the bill of complaint. From this decree an appeal was taken by Harding, and two years afterward the Illinois Supreme Court held that because of the irregularities in the notices of election, the bonds ought not to be issued.

The plaintiff in error contends that this *lis pendens* is to be held notice to defendant in error that such a suit was pending when the bonds issued; that the facts as to the notices of the election charged in that bill were true, and the decision of the Circuit Court dissolving the injunction was erroneous: that Harding would appeal from it, and

that the Supreme Court would reverse the judgment of the Circuit Court in the face of the express finding. (Record, p. 89); that the defendant in error had no actual knowledge of any such suit pending, or of any irregularities which were charged as existing.

This whole defense depends solely on the application of the doctrine of notice by *lis pendens*.

There is no question of the effect of a pending injunction. The injunction was dissolved on the 23d of January, and the bonds did not issue until the 25th of January, and the injunction was not even revived by the appeal; so that from and after the 23d day of January, until after May, 1873, there was no injunction pending.

Bressler v. *McCune*, 56 Ill. R., 477.

But even if the bonds had been transferred in defiance of a pending injunction of a court having full jurisdiction over the person in whose possession they were, this would not have affected the title of the holder for value, who acquired them before maturity without actual notice.

Winston v. *Westfeldt*, 22 Alabama, 760.
Nat'l Bk. Washington v. *Texas*, 20 Wall., 88.
Lexington v. *Butler*, 14 Wall., 282.

Is then the doctrine of notice by *lis pendens* applicable to this class of paper?

That these bonds are to be treated as negotiable commercial paper, and that, like other negotiable commercial paper, they pass from hand to hand free of equities, is a doctrine so frequently announced by this court, and concurred in by other courts, that it has ceased to be a disputed point.

Dillon's Law of Municipal Bonds, p. 10.

That the doctrine of notice by *lis pendens* does not ap-

ply where the property is without the jurisdiction in which the suit is pending, though removed there during the pendency of the suit, seems to be consonant with the analogies of law, and is decided in

Shelton v. *Johnson*, 4 Sneed, 672.

That the doctrine of notice by *lis pendens* does not apply to commercial negotiable paper, is also thoroughly settled.

Stone v *Elliott*, 11 Ohio State R., 253.
Winston v. *Westfeldt*, 22 Alabama, 760.
National Bank of Washington v. *Texas*, 20 Wall., 88.

Mr. Justice MILLER, of this Court, held that the doctrine of notice by *lis pendens* did not apply to municipal bonds issued to a railroad company, in

Durant v. *Iowa County*, 1 Woolworth, p. 69,

and this is the settled rule of this Court.

Lexington v. *Butler*, 14 Wall., 282.
Olcott v *Supervisors*, 16 Wall., 689.

Counsel attempts to distinguish between the cases cited and the case at bar; he says that in the decided cases the suit was brought against the negotiation of existing paper, while in this case the suit was commenced to prevent the paper being made. I can perceive no substantial ground for the attempted distinction.

In the case of *Olcott* v. *Supervisors*, above cited, I understand, (though the opinion does not distinctly aver the fact,) that the suit under which the act was finally declared unconstitutional by the State Court, was pending when the bonds were issued.

In the case of *The City of Lexington* v. *Butler*, above cited, this question of notice by *lis pendens* in the case of municipal bonds not issued when the suit was brought, is, as I think, definitely settled.

In that case the city refused to issue the bonds, a mandamus was brought, and, under the orders of the *nisi prius* court, the bonds issued. This judgment was reversed by the Court of Appeals of Kentucky, and a rule was made on the company to return the bonds, and before they were negotiated an injunction against the issue was obtained—both actions were then pending—and after all these proceedings, and with these actions pending, the company delivered the bonds to Butler.

This Court held that a replication denying notice of the pendency of these proceedings when he purchased the bonds, was a good answer to the plea.

Counsel seems inclined to liken the case to an attempt by suit to revoke the powers of an agent. I think that no authority can be found holding that a suit for an injunction against an agent; or an injunction itself will be notice of a revocation of the powers of an agent. Certainly it will not be such notice to persons without the jurisdiction.

And the cases themselves are dissimilar. The vote of the people required by the act of March 25th is not the authority under which the officer acts—it is but a step in the exercise of the powers granted by law to the corporation.

Humboldt Township v. *Long et al.*, 92 U. S. R., 645.

And the officers of the corporation are not the agents of the tax-payers; they are sometimes called the agents of the corporation, but this is a misnomer; they are the hands of the corporation, within the authority granted by law; their acts are the acts of the corporation. To ascertain whether their acts in issuing bonds are authorized, we examine the law constituting the charter of the corporation; and find that these bonds might be issued by these officers, provided a majority of the tax-payers should express their desire to have it done; to ascertain whether the tax-payers have expressed that desire, the law refers us to certain

records of the same corporation. An examination of these records, as well as the recitals in the bonds, show that they have expressed that desire, in the form prescribed by the statute. Here we can rest upon the record of a full compliance with the law. We have thus examined the authority of the agent, and find it complete ; and we ought not to be obliged to go to each tax-payer of the county to see if he has not discovered some irregularity in the action of the corporation preliminary to the making of this record, of which no record is directed to be kept ; nor are we called upon to go to the record of each court which may have acquired jurisdiction over the officer, to see if the tax-payer has not attempted to take advantage of such irregularity. He is not the principal; he has no power to grant or revoke the authority ; neither he, nor all the tax-payers combined, can remove the officers of the corporation, or take away any portion of their powers. His remedy for any wrong which the officer has done, is against that officer. The law has given him an ample preventive remedy by injunction,

The Law of Municipal Bonds, Dillon, p. 20, note 26.

which, if he diligently pursues, will prevent not only any injury to himself, but any wrong against those who, if he does not pursue that remedy, may be induced to purchase the bonds.

It was claimed in this case, that this preventive remedy had proved futile. I may say, with Mr. Justice MILLER, in *Durant* v. *Iowa County*, where the same claim was made: "Not so; an injunction will prevent the transfer of "the securities during the pendency of the suit, (in this "case their issue during the pendency of the suit,) and a "decree that they be delivered up to be canceled, if en- "forced at once, will protect the parties. A neglect to "take out an injunction, or enforce such a decree, is the "fault of the plaintiff, not of the law."

In this case, the record shows that while the injunction existed it was obeyed; and it is not to be presumed that the authorities would have violated the injunction, if it had been kept alive. On the 23d day of January, 1871, it was dissolved by the Circuit Court, and from that time to the 27th day of January, no attempt was made to keep it in force, or to appeal, so that it became, and was absolutely dissolved, and not binding, and no appeal would revive it.

Bressler v. *McCune*, 56 Ills., 477.

From January 23d, 1871, until the summer of 1873, no injunction existed against the issue of these bonds. On the 25th of January, 1871, the Board of Supervisors met; they found that no injunction against the issue of the bonds existed, and that no attempt had been made to keep the injunction alive by an appeal, or to renew it: that in the judgment of the highest court before whom the cause had then been presented, the bonds should be issued. It is difficult to perceive what they could do in the face of section 8 of the law of March 25, 1869, which provides for a penalty in case any officer refuses to do his duty; except to order the bonds to issue, and they so ordered. No action is attempted by Harding until after the bonds were issued, registered, and probably sold.

The tax-payer claims to have been delinquent in the prosecution of his cause; but the fact remains that he allowed the time, from the 23d day of January, to the 27th of January, to elapse, without offering to appeal, and then only offered to appeal from an interlocutory order, which he should have known could not be appealed from.

Titus v. *Mabee*, 25 Ills., 257.
Bressler v. *McCune*, 56 Ills., 477.

If, upon the order being entered to dissolve the injunction, he had caused the bill to be dismissed, and had then appealed, the injunction would have continued in force,

and he would have been under a bond to secure the defendants against damages.

Penticost v. *Magaher*, 4 Scam., 326.
Weaver v. *Poyer*, 70 Ills., p. 569.
Bressler v. *McCune*, 56 Ills., 477.
Prout v. *Lomer*, 79 Ills., 331.

By allowing this time to elapse, between the entry of the order dissolving the injunction and the dismissal of the case and his appeal, he discharged his injunction bond, and allowed the order dissolving the injunction to take effect, so that it could not be revived by the appeal.

Bressler v. *McCune*, 56 Ills., 477.

He had the opportunity to supersede the order which allowed the bonds to issue. If he had done so, the bonds would never have been issued.

It is to his own laches, ignorance of the law, or desire, that he must attribute the failure of his remedy.

I therefore submit, that the remedy by injunction, in such cases, is perfect and ample, and that no reason exists for the revresal of the rule as to notice by *lis pendens*.

In framing the preceding portion of this argument, I have studiously avoided criticising, or running counter to the opinion of the Illinois Supreme Court in Harding's case, not because I thought the main point in that case was founded in principle, or binding on this court, but because it seems to me plain that, conceding that decision to be correct, this case falls within the unmistakable rules and precedents established in this court, and in the Illinois Supreme Court, which will fully sustain the judgment rendered in this case by the learned judges presiding in the court below. And I will not now do more than make reference to the points on which I rely to show the judgment of the State Court erroneous, and not binding on this court.

First. No provision of law existed requiring an advertisement for thirty days prior to the election.

The act of March 25th, 1869, constituted a complete "code" of procedure for a subscription by Warren County to the capital stock of the Rockford, Rock Island and St. Louis Railroad Company, and the issuance of these bonds in payment therefor.

The provisions of that act, especially § 2, which provides for a subscription to be made on such conditions as the corporate authorities may prescribe, and § 10, which provides that "such question shall be submitted (to a vote of "the people) in such manner as the county authorities may "determine as to the county," are broad enough to cover the direction as to the time of advertising the election, and did in fact submit this question to the discretion of the Board of Supervisors.

Who by their order of March 16th confirmed and approved of the notice which was in fact given.

The act of March 4th governed elections held under that law only; it is an affirmative enabling act, and does not attempt to regulate other elections. The act of March 26th is an affirmative enabling act, and does not attempt to regulate elections not called under it.

The act of March 25th is an affirmative enabling act; no reason therefore exists for importing into the act of March 25th any of the provisions of either of the other acts, or of any other merely affirmative enabling statute.

The act of March 25th having been passed after the general act of 1849, relating to subscriptions by municipal corporations, and after the act of March 4th, above referred to. The fact that the Legislature omitted the provisions in those acts directing notice for a specified time, viz, thirty days, showed an intention to change the rule as to the exercise of the power conferred by the act of March 25th, and of committing it to the discretion of the supervisors.

Second. Harding, the plaintiff in that suit, was guilty of laches, which should prevent his successfully asserting such an irregularity as was complained of.

The want of thirty days' notice was at best a mere irregularity. The posting of notices was the duty of the officers of the county, over which the railroad company had no control.

There was time between the calling of the election and the time when it was to be held, to give thirty days' notice. There was no record evidence provided for, and no notice to the railroad company that full notice was not given, and no complaint of any fraud on the part of the railroad company, or of the county officers, in preventing or suppressing such notice. Almost ten months after the election was held, and four months after the subscription was made, had elapsed, before Harding filed his bill, and in the mean time the railroad company acted on the faith of this election, and of the subscription.

Third. This Court is not bound by the decree in the Harding case.

It conflicts with the decisions of the Supreme Court of Illinois made before the issue of the bonds, viz:

Johnson v. *Stark County*, 24 Ills., 90.
Prettyman v. *Tazewell County*, 19 Ills., 414.
Piatt v. *The People*, 29 Ills., 54.
Bruce v. *Schuyler*, 4 Gilm., 271.
Belleville R. R. v. *Gregory*, 15 Ills., 25.
Turney v. *Wilton*, 36 Ills., 395.
Robertson v. *Rockford*, 21 Ills., 451.

And with the decisions of other well considered cases in other courts.

The E. &c. R. R. Co. v. *City of E.*, 15 Ind., 419.
Casey v. *Howard County Judge*, 5 Clark, (Ia.) 1.
Knox Co. v. *Aspinwall*, 21 How., 544.

In such cases, where the issue was lawful under the decisions of the State Court when the bonds were negotiated, this Court will not be bound by subsequent decisions to the contrary.

I will not attempt to cite the numerous cases, but refer only to

Olcott v. *Supervisors*, 16 Wall., 689.

and to cases cited in

Dillon on Municipal Bonds, p. 57 and note 52.

CHAS. M. OSBORN,

Counsel for Defendants in Error.

IN THE

Supreme Court of United States

OCTOBER TERM, 1877.

THE COUNTY OF WARREN,
Plaintiff in Error,
vs.
THE PORTSMOUTH SAVINGS BANK,
Defendant in Error.

No. 268.

Brief of Defendant in Error.

WILSON & PERRY,
OF COUNSEL.

CHICAGO:
Beach, Barnard & Co., Legal Printers, 104 Randolph Street.

1878.

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Defendant in Error.

No. 255.

BRIEF FOR DEFENDANT IN ERROR.

STATUTES.

The following statutes of the State of Illinois are referred to in the finding of the court below.

FIRST.

"An Act to amend an act entitled 'an act to incorpo-
"'rate the Rockford, Rock Island and St. Louis Railroad
"'Company,' approved February 16th, A. D. 1865." Approved and in force, 4th March, 1869.

"§ 6. Any incorporated city, or any town, village or county, through which said railroad may pass, or which may be situated on or near the line of said railroad, may subscribe to the capital stock of said company any sum

not exceeding one hundred thousand dollars, and may issue bonds, in denominations of not less than one hundred dollars, with coupons for the interest properly attached, bearing interest at any rate not exceeding ten per cent per annum, payable annually, which bonds may run any period, not exceeding thirty years, to be determined on by the county court, board of supervisors, city council, town trustees, or other the legal and proper authorities authorized to issue said bonds: *Provided*, that before said stock shall be subscribed, an election shall be held in conformity to the laws in regard to ordinary State, city, county, or town elections, thirty days' notice first having been given, by publication in at least one newspaper in the county, and six public notices, printed or written, having been posted in six of the most public places therein during the time above named, and returns to be made in the usual way; at which election a majority of the legal voters, voting on the question, shall have voted in favor of said subscription; and to this end, the * * board of supervisors * * may from time to time, order elections, specifying the amount proposed to be subscribed; and such * * county is hereby authorized and required to assess and levy a sufficient tax to pay the interest accruing on such bonds, as expressed in the coupons thereto attached, and the principal of the same when due; which tax shall be assessed, levied and collected in the same manner as other taxes are by law required to be assessed, levied and collected.

"§ 15. This act shall be deemed a public act, and shall take effect and be in full force from and after its passage."

SECOND.

"An Act to authorize certain counties and towns there-
"in named to subscribe stock in railroad companies."
Approved and in force, 25th March, 186).

"§ 1. That the counties of Warren * * * be and they and each of them are hereby authorized and empowered to purchase or subscribe for shares of the capital stock in any railroad company already organized, or hereafter to be organized, which passes in whole or in part through the said counties * * * to such an amount as any of said counties * * * shall determine and deem best and proper; and the stock so purchased or subscribed for shall be under the control of the corporate authorities

of the county or town making such subscription in all respects as stock owned by individuals.

"§ 2. Subscriptions to the capital stock of any such railroad company may be made by an agent appointed by the board of supervisors * * * on behalf of said counties * * * upon such terms and conditions as the corporate authorities of any such county * * may prescribe—and for the payment of such stock so subscribed, * * the board of supervisors * * * are hereby authorized and empowered * * * to pay for the same in the bonds * * of such county * * to be drawn for that purpose, in sums not less than one hundred dollars, to run not exceeding twenty years, bearing not exceeding ten per cent. interest per annum, payable annually * *.

"§ 3. The railroads already incorporated, or that shall hereafter be incorporated by any law of this State, passing in whole or in part through any of the said counties or towns, are hereby authorized to receive the bonds * * of any of said counties or towns, in payment of the capital stock of such company, at par, in lieu of cash, and to dispose of them as they may think proper and best, for the purpose of constructing such roads or equipping the same.

"§ 4. All such bonds * * of any of said counties shall be issued by the clerk of the county court, under the seal of his office, upon the order of the county authorities. * * *

"§ 10. No subscription to stock shall be made by any of the counties or towns herein mentioned, under the provisions of this act, unless the same is submitted to a vote of the people of such county, * * and unless the same shall receive a majority of the votes cast upon such question at such election. *Such question shall be submitted in such manner as the county authorities may determine.* * *

"§ 12. This act shall be deemed and taken as a public act, and shall take effect and be in force from and after its passage."

THIRD.

"An Act to empower county courts and the corporate "authorities of cities and incorporated towns to subscribe "to the stock of the Rockford, Rock Island and St. Louis "Railroad." Approved and in force, 26th March, 1869.

"§ 1. The *county courts* and the corporate authorities of cities and incorporated towns in counties *not having township organization*, and the corporate authorities of towns and cities in counties that *have* township organizations, are hereby authorized," &c.

This act *confers no powers at all on counties having township organization*, whose affairs are administered by a board of supervisors, but refers, as to counties, solely to those not having township organization, and whose affairs are administered by the county court.

FOURTH.

The Statute of 16 *April*, 1869, provides that bonds issued by a county or town, in payment of a debt created under the provisions of any law of Illinois, to aid in the construction of a railway, may be registered by the holder thereof, in the office of the State Auditor of public accounts, who shall cause the same to be registered in a book kept for that purpose; and the said auditor is required, under his seal of office, to certify, upon such bond, the fact of such registration. The *conditions precedent* to such registration, are stated in section seven of said act as follows:

"None of the benefits, advantages or provisions of this act shall apply to any debt, unless the subscription creating such debt was first submitted to an election of the legal voters of said county, under the provisions of the laws of this State, and a majority of the legal voters living in said county were in favor of such subscription; and any county shall have the right, upon making any subscription to any railroad company, to prescribe the conditions upon which such bonds or subscriptions shall be made, and such bonds or subscriptions shall not be valid and binding, until such conditions precedent shall have been complied with, and until the proper officer shall certify, under oath, that all the preliminary conditions in this act, required to be done to authorize the registration of such bonds, and to entitle them to the benefits of this act, *have been complied with*, and shall transmit the same to the State Auditor, with a

statement of the date, amount, number, maturity and rate of interest of such bonds, and to what company, and under what law issued, and thereupon the said bonds shall be subject to registration by the State Auditor as hereinbefore provided."

THE ESSENTIAL FACTS OF THE CASE, AS FOUND BY THE COURT BELOW.

The plaintiff, when he commenced this suit, was the holder of the coupons of the bonds of the county of Warren, bought by him for value before their maturity, and without actual notice of their alleged invalidity, or of any suit in relation thereto:

[That at the time these coupons matured, and ever since, the county denied their validity;]

That the coupons were for the annual interest on certain bonds of the County of Warren, which, to the amount of two hundred thousand dollars, of the form and denomination described in the declaration, were executed 25th January, 1871, under the hand of the clerk of the board of supervisors of said county, and with the seal of the county, by order of a majority of the members of said board, at a meeting of said board held on said day, and then delivered by said clerk, as directed by the majority of said board, to the Rockford, Rock Island and St. Louis R. R. Company, in payment of a subscription for a like amount to the stock of said company, which purported to have been made in March, 1870, in the name of said county, by the chairman of said board, in pursuance of an order of said board, as is hereinafter stated;

That said bonds were registered in the office of the county clerk of Warren County, and so certified by said clerk 25th January, 1871, and were also registered 27th January, 1871, in the office of the State auditor of public

accounts, and so certified by said auditor; the said certificates of said clerk and auditor being on each of said bonds;

That the proceedings of the board of supervisors and county officers, which resulted in the issue of said bonds, were as follows:

On the 23d day of August, 1869, the said board called an election of the people of Warren County, to be held 23d September, 1869, for the purpose, as stated in their order and the notice of said election, to determine the question of a county subscription of two hundred thousand dollars to the stock of the Rockford, Rock Island and St. Louis Railroad Company, "including the one hundred "thousand dollars previously voted"; that the "one hun- "dred thousand dollars previously voted" was a subscription never made, but "previously voted" by the people of Warren County to the St. Louis, Alton and Rock Island Railroad Company, and the right to have this sum was claimed to have been transferred to the Rockford, Rock Island and St. Louis Railroad Company, by virtue of an act of the General Assembly of the State of Illinois, passed at the session of 1869;

[That notices for the election of 23d September, 1869, were not published in the newspapers of said Warren County until 27th August, 1869; that some of those posted in the county were not posted for the full period of thirty days, and in one township no notice at all was posted; but that in all the townships except the one, notices were published for periods varying from twenty to thirty days;]

That the election was held 23d September, 1869; that at said election, those voting *for* said subscription were 1,775, and those voting *against* it were 975, [and the total vote of the county, as shown by the votes cast at the last general election, was 4,731;] that said votes, soon after 23d September, 1869, were duly canvassed and filed in

the clerk's office, and that on 16th March, 1870, the said board of supervisors declared that the election had resulted *in favor* of the subscription, and ordered David Turnbull, their chairman, to subscribe two hundred thousand dollars to the stock of said first named company;

[That, on the 18th day of July, 1870, A. C. Harding, a tax-payer and citizen of said county, filed a bill in chancery against the county officers and said company, asking for an injunction to prevent said subscription being made, and said bonds from being issued, and obtained the injunction in August, 1870;]

[That the bill was filed by said tax-payer, as above stated, in behalf of himself and of all other tax-payers and citizens of said county, and against the said Board of Supervisors, its chairman and clerk, and said company, as defendants, in the Circuit Court of Warren County, Illinois;]

[That Harding, in his bill, set up the foregoing facts, and charged that the said county officers had no authority by law to make said subscription and issue said bonds, but threatened to do so, and prayed that they be restrained by a writ of injunction from so doing, and that their proceedings be set aside and declared void;]

[That a summons and writ of injunction, according to the prayer of the bill, were issued and served upon the defendants in August, 1870; that said injunction remained in full force until 23d January 1871, when, on motion of the said defendants, and against the objections of the complainant, it was dissolved;]

[That the complainant, at the same term—on the 27th of January, 1871—prayed an appeal from the order dissolving the injunction, offering proper bond, but the court refused the appeal;]

[That the said cause went to a final hearing, which was

had at same term—2d February, 1871—and a decree was entered dismissing the bill;]

[That from this decree the complainant prayed and perfected an appeal to the Supreme Court of the State, and so prosecuted the same, that at the first term thereafter of said Supreme Court the cause was heard, and the court afterwards, in 1873, entered a decree reversing the decree of the Circuit Court, and ordering the cause to be remanded, with directions to the Circuit Court to enter a decree for the complainant according to the prayer of the bill;]

[That in accordance with the order of said Supreme Court, and after the suit in this case was commenced, but before the trial, in 1873, the decree was entered in the Circuit Court of Warren County;]

[That the said case of said Harding was commenced and prosecuted by him in good faith, and without collusion;]

[That the acts of 4th, 25th, and 26th March, 1869, above referred to, were pending before the legislature at the same time, and the two former acts were reported by the same committee to the senate at the same time, the latter of the two being amended, and a substitute for the former being recommended by the committee, and this recommendation being concurred in, both were then passed in their new shape;]

[That it appears by the journals that the law of 25th March was first introduced into the legislature — both this and the bill of 4th March being house bills; that the act of 25th March passed every step of its progress in the house and then went to the senate, and there passed its second reading, and was referred to said committee before the act of 4th March overtook it;]

That the road of said company is about 300 miles long,

was partially built north and south of Warren County, and it was declared by the company that it would go through Warren County, before said election was held;

[That before the said subscription of the county was made, and its bonds issued, the said railroad company had obtained from the towns of Warren County subscriptions to the amount of about $150,000 to its stock; in payment of which, about the same time, the bonds of said towns were issued to said company.]

And that some of the foregoing facts were objected to by the plaintiff's counsel as incompetent and irrelevant, and were admitted by the court subject to objection.

COPY OF BOND.

"STATE OF ILLINOIS,
COUNTY OF WARREN.

No. ——. $1,000 —.

"On the first day of July, in the year of our Lord one thousand eight hundred and ninety, the County of Warren and State of Illinois, promises to pay to the Rockford, Rock Island and Saint Louis Railroad Company, or bearer, the sum of one thousand dollars, and interest thereon at the rate of eight per cent. per annum, payable annually on the first day of July in each year, on presentation to the treasurer of said Warren County of the respective interest coupons which are hereto severally adjoined.

"This bond is issued in conformity with the vote of the electors of said county, cast at an election held on the twenty-third day of September, A. D. 1869.

"*In testimony whereof*, and pursuant to the authority granted by law, and upon the order of the Board of Supervisors of said Warren County, passed at an adjourned session thereof, begun on the 25th day of January, A. D. 1871, I, Clerk of the County Court of said county, have hereunto signed my name as such clerk, and affixed the seal of said County Court, this 25th day of January, A. D. 1871.

[SEAL.] "W. G. BONE,

"*Clerk of the County Court of Warren County.*"

The defendant in error still insists, that all the statements above, which are included in brackets, were incompetent as evidence against him, and should not be considered as facts in the case.

I.

THE BONDS IN QUESTION, WITH THE INTEREST COUPONS ATTACHED, ARE COMMERCIAL SECURITIES, AND ARE REGARDED, IN THE HANDS OF BONA FIDE HOLDERS, THE SAME AS BILLS OF EXCHANGE AND PROMISSORY NOTES.

White v. *Vt. & Mass. Ry. Co.*, 21 How., 577.
Moran v. *Commissioners, &c.*, 2 Black., 731.
Mercer Co. v. *Hackett*, 1 Wall., 95.
Gelpcke v. *Dubuque*, 1 Wall., 206.
City of Lexington v. *Butler*, 14 Wall., 295.
St. Joseph Township v. *Rogers*, 16 Wall., 659.
Humboldt v. *Long*, 92 U. S. Rep., 643.
Commissioners v. *Clark*, 94 U. S. Rep., 287.

II.

THE DOCTRINE OF LIS PENDENS, OR NOTICE BY REASON OF THE PENDENCY OF A SUIT, IS NOT APPLICABLE, AND IS NOT APPLIED BY THE COURTS, TO NEGOTIABLE INSTRUMENTS AND SECURITIES, OR TO COMMERCIAL PAPER.

Leitch v. *Wells*, 48 N. Y., 586.
Stone v. *Elliott*, 11 Ohio St., 252.
Kieffer v. *Ehler*, 18 Penn. St., 391.
City of Lexington v. *Butler*, 14 Wall., 283.
2 Leading Cases in Equity, Ed. of 1877, 196.
2 Powell on Mortgages. 618.

Durant vs. Iowa Co,
1 Woolworth Cir. Ct. 69

Leitch v. *Wells*, was a case commenced by Catherine L. Leitch against John Kellogg, in relation to certain bank stocks held by John Kellogg, under the will of Daniel Kellogg, as an executor, and trustee for the plaintiff, and which were adjudged to belong to her, and her legal representatives. It appeared that, *pending the suit*, John Kellog transferred the stock to the American Express Company, which took the same as security for loans of money, without any *actual* knowledge of the pendency of the said suit of the plaintiff, or that she had any claim to the stock, or that John Kellogg was an executor and trustee, under the will of Daniel Kellogg, deceased.

The doctrine of *lis pendens* was urged by the plaintiff, to defeat the claim of the express company to the stock.

EARL, C. said: "The rule of *lis pendens* has been applied most frequently to purchasers of *real estate*, and very rarely to purchasers of personal property.

"As to real estate, it has long since been abrogated by statute in New York, unless a *lis pendens* has been filed in the proper clerk's office.

"As to *personal property*, in this age and country of great enterprise, and rapid circulation of such property, the rule is capable of working more mischief than good, and can hardly claim to be founded on necessity and public policy.

"*Stocks* are articles of *commerce*, and the dealings in them, every business day of the year, far surpasses in value the dealings in any other species of personal property. They pass from hand to hand, in commercial transactions, like negotiable notes or bills of exchange. They are sold and pledged, and in many ways form the basis of credit.

"Since the decision of *McNeil* v. *Tenth National Bank*, 46 N. Y., 325, certificates of stock, with blank assignments and power of attorney attached, must be nearly as negotiable as commercial paper.

"The doctrine of *constructive notice* by *lis pendens*, *has never yet been applied to such property*. This doctrine must have its limitations. *It could not be applied to ordinary commercial paper*, nor to bills of lading, nor to government or

corporate bonds payable to bearer. I do not find that it has ever been applied, and I do not think it ought to be applied, to any of the articles of ordinary commerce. Public policy does not require that it should be thus applied. On the contrary, its application to such property would work great mischief, and lead to great embarrassments."

Stone v. *Elliott* was a suit by Elliott, the indorsee of a note, against Stone, the maker. The note was payable to the order of one Grove, who indorsed it in blank, and delivered it to one Smith. While the note was yet in the hands of Smith, certain of his judgment creditors filed a bill against him and against Stone, the maker of the note, for the purpose of subjecting the note in the hands of Smith, and the money to become due thereon, to the payment of complainant's judgments. Process was served on Smith and Stone, and a decree entered finding that Smith owned the note, and ordering Stone, the maker, to pay the note when due to the clerk of the court, to be applied on complainant's judgment.

It appeared that *after* the filing of the bill, and the service of process on Smith, then the holder of the note, Smith sold and delivered the note, not then due, to Elliott, the plaintiff below. Elliott was not a party to the chancery suit, and had no actual notice of it.

It was claimed by Stone, as a defense to the suit on the note by Elliott, that the *pendency of the Chancery suit* was *notice* to Elliott of the *subject matter* of the suit; that the *lis pendens* commenced from the service of process on Smith after the bill was filed, and that the transfer of the note by Smith to Elliott after that, and *pendente lite*, was void.

" *The Court held* that the doctrine of *lis pendens* does not apply to negotiable paper. It is founded on no principle of natural equity, but has its foundations solely in considerations of public policy; and the policy which *excepts* negotiable paper from its operation is, at least, as

wise, as important, and as well established, as is that on which the rule itself has its foundations."

In *Kieffer* v. *Ehler* the Court holds:

"That bills of exchange and promissory notes, unlike other property, carry their whole evidence of title on their face; and the law assures the right of him who obtains them for valuable consideration, by regular indorsement, and without *actual* notice of any adverse claim, or of such suspicious circumstances as would lead to inquiry.

"To hold that an attachment, (garnishee process in this case), prevents a subsequent *bona fide* endorsee, for value, from acquiring a good title, would be almost a *destruction* of one of the essential characteristics of negotiable paper. The doctrine of implied notice by *lis pendens* is totally inapplicable to such cases."

In *City of Lexington* v. *Butler*, it appeared that the city, acting under the authority of certain statutes, issued its bonds to a railroad company, payable to its order, and by it indorsed payable to bearer. The bonds were sold in the market by the railroad company, and Butler, a citizen of Ohio, purchased some of them. This was a suit by him against the city to recover on interest coupons attached to the bonds.

The city set up as a defense, that it was authorized to issue the bonds only on certain specified conditions; that these conditions not being complied with, it had refused to issue the bonds; that the railroad company thereupon obtained a judgment of mandamus to compel the city to issue its bonds, and that in compliance with that judgment, it did issue its bonds to the company--that after that, the Court of Appeals of Kentucky, on appeal, reversed the judgment of mandamus, and a rule was afterwards made, in that case, ordering the company to re-deliver the bonds to the city to be canceled; but the company refused to re-deliver them; that *before the company had negotiated the bonds sued on*, the city also, in another suit, obtained an *injunction* against the issue, and an

order that the bonds be deposited with a receiver; and that these orders, although process was duly served on the company, were not obeyed, and that both actions were still pending; that it was *after all these proceedings*, and with *these actions pending*, that the company transferred and delivered the bonds to Butler.

To this plea Butler replied, traversing the notice, and denying all knowledge of any facts set out in the plea, when he purchased the bonds.

The case finds that Butler was a *bona fide* holder of the bonds, without notice of the alleged defects in the inception of the instruments.

The Court says:

"Coupons attached as interest warrants to bonds for the payment of money, lawfully issued by municipal corporations, as well as the bonds to which they are attached, when they are payable to order and indorsed in blank, or are payable to bearer, are transferable by delivery, and are subject to the same rules and regulations, so far as respects the title and rights of the holder, as negotiable bills of exchange and promissory notes. Holders of such instruments are as effectually shielded from the defense of prior equities between the original parties, if unknown to them at the time of the transfer, as the holders of any other class of negotiable instruments.

"Admitted, as it is, that the corporation defendants possessed the power to subscribe for the stock, and issue the bonds, it is clear that the plaintiff is *entitled to recover upon the merits;* as the repeated decisions of this court have established the rule, that when a corporation has *power, under any circumstances*, to issue negotiable securities, the *bona fide* holder has a right to *presume* that they were issued under the circumstances which give the requisite authority, and that they are no more liable to be impeached for any infirmity in the hands of such a holder, than any other commercial paper."

In 2d Leading Cases in Equity, the doctrine of *lis pendens*, in its relation to the case at bar, is stated as follows:

"The rule that a pending bill is notice, does not reach

far enough to hamper the circulation of money or *negotiable securities, for as to these, the market is always overt.*"

In 2d Powell on Mortgages, it is said, there is no case in which equity has determined the property in goods to be affected by reason of a *lis pendens*, where *possession* is the principal evidence of ownership, as of personal chattels.

It is submitted that no authority can be found, in which the doctrine of *lis pendens* has been applied by any court, to commercial paper, or to any instruments or securities recognized by such court as negotiable or commercial paper.

It was contended in the court below, on behalf of the County, that the rule holding the docrine of *lis pendens* inapplicable to commercial securities, does not apply to such securities where they *did not exist* at the time suit was brought, and where the object of the suit was to *prevent* their issue.

It was further contended that, in such a case, the pendency of the suit is, in its legal effect, a *limitation* of the *power* of the agent to issue the securities, and that purchasers are bound to inquire as to *limitations* of power, as well as to its original existence.

It was claimed that no case can be found, where the bonds had not been issued at the time suit to restrain their issue was commenced, in which the court refused to apply the doctrine of *lis pendens.* It is a sufficient answer to this to say, that no case of this kind can be found where the court *has* applied this doctrine.

The court was thus asked to find a *distinction* between cases where the commercial paper sought to affected by this doctrine had been issued at the time of the commencement of the suit, and cases where it had not been issued, and the object of the suit was to prevent its issue.

The distinction sought to be enforced, is clearly without a difference, for the very reasons, and upon the very principles, on which the courts have uniformly declined to apply the doctrine to negotiable securities; and the mischiefs sought to be avoided by the rule applied by the courts, would exist alike, and with equal force, in both cases.

If the power *exists* to issue such securities, a *bona fide* purchaser of them in open market, is under no obligation to seek for limitations of that power, except in the acts of the legislature which granted the power.

If such a suit was in legal effect a limitation of the power, no man could purchase such securities with safety, until he had examined all the court records in the State where the bonds were issued. Ample statute authority would be no protection to him. This would be reversing the entire jurisprudence of this Court on the subject of commercial paper.

The *City of Lexington* v. *Butler*, was decided on principles directly adverse to this claim. While it is true the bonds in that case, under the order of a mandamus, had been issued to the railroad company—they were still in the hands of the company, and had not been put on the market when the order of the Appellate Court was made directing the bonds to be re-delivered to the City to be cancelled. The suit was still pending; the order in full force; the bonds in the hands of a party to the suit; and being held void by the Appellate Court, may be fairly said not to have been issued. Before the company had negotiated the bonds, the city had also, in another suit, obtained an *injunction* against the company, restraining the issuing of the bonds, and an order that the bonds be delivered to a Receiver, and this injunction and order were in full force. Yet the bonds were negotiated by the company in defiance of the orders of the court—put upon the

market, Butler bought them, and this Court held that he could recover on them on the merits.

In the case at bar, an injunction was obtained restraining the issue of the bonds. This injunction, upon hearing, was dissolved; and there being then no order restraining, and there being full statute power authorizing, their issue, the Board of Supervisors directed their issue, and they were issued in accordance with that power. What pretence can there be that the pending bill, thus eviscerated, operated as a *limitation* upon the *statute power?*

This was simply a bill for an injunction. Under the practice in chancery in Illinois, where an injunction on such a bill is dissolved, the complainant may have his bill dismissed for want of equity, claim his appeal, and thereby his injunction will be continued until the disposal of his appeal by the Supreme Court.

Weaver v. *Poyer*, 70 Ill., 567.
Bressler v. *McCune*, 56 Ill., 475.

If this had been done, no bonds would have been issued. But the complainant, on the dissolution of his injunction, which was a practical ending of his suit, still allowed it to go on, to be finally disposed of at some future time, and so left the Supervisors free to execute the powers granted by the statute.

It is not good faith to thus abandon the only effective part of the suit, allow the Supervisors to execute the powers conferred by the statute, and then, after *bona fide* purchasers have purchased the bonds, to attempt to set up, as against them, a matter once fully in the hands of the complainant in that suit, but practically abandoned by him at the very time when he had the power to make his objections effective.

III.

THE STATUTES OF 4TH AND 25TH MARCH, 1869, ARE AMPLE AUTHORITY TO THE COUNTY OF WARREN TO SUBSCRIBE FOR STOCK IN THE ROCKFORD, ROCK ISLAND AND ST. LOUIS RAILROAD COMPANY, AND TO ISSUE BONDS, LIKE THOSE IN QUESTION, IN PAYMENT THEREFOR, AN AFFIRMATIVE VOTE OF THE COUNTY BEING FIRST GIVEN IN FAVOR THEREOF.

3 Vol. Private Laws 1869, pp. 342, 368.

IV.

THE BOARD OF SUPERVISORS WERE INVESTED WITH FULL POWER TO SUBMIT TO THE VOTERS OF THE COUNTY THE QUESTION OF SUBSCRIBING TO THE STOCK OF THE RAILROAD, AND ALSO TO DECIDE WHETHER OR NOT THE ELECTION WAS PROPERLY HELD, AND THE MAJORITY VOTE CAST IN FAVOR OF THE SUBSCRIPTION; AND THE BOARD HAVING ORDERED THE BONDS IN QUESTION TO BE ISSUED, WITH A RECITAL THEREIN THAT THEY WERE ISSUED IN CONFORMITY WITH THE VOTE OF THE ELECTORS OF SAID COUNTY, THE BONDS ARE, IN THE HANDS OF THE PLAINTIFF, CONCLUSIVE OF THE FACT THAT SUCH AN ELECTION WAS LEGALLY CALLED AND HELD, AND ARE BINDING ON THE COUNTY.

Comr's of Knox Co. v. *Aspinwall*, 21 How., 543.
Bissell v. *City of Jeffersonville*, 24 How., 299.
Moran v. *Com'rs of Miami Co.*, 2 Black, 724.
Van Hostrup v. *Madison City*, 1 Wall., 297.
Grand Chute v. *Winegar*, 15 Wall., 371.
Lynde v. *The County*, 16 Wall., 13.
Kenicott v. *The Supervisors*, 16 Wall., 464.

St. Joseph Township v. *Rogers*, 16 Wall, 659.
Town of Coloma v. *Eaves*, 92 U. S. Rep., 487.
Marcy v. *Town of Oswego*, 92 U. S. Rep., 639.
Humboldt Township v. *Long*, 92 U. S. Rep., 644.
Commissioners, &c., v. *January*, 94 U. S. Rep., 205.
Commissioners, &c., v. *Clark*, 94 U. S. Rep., 287.
Town of E. Lincoln v. *Davenport*, 94 U. S. Rep., 801.

V.

A BONA FIDE PURCHASER OF MUNICIPAL BONDS, WHICH CONTAIN A RECITAL THAT THEY WERE ISSUED IN CONFORMITY WITH THE VOTE OF THE ELECTORS OF THE COUNTY, CAST AT AN ELECTION HELD IN SAID COUNTY, IS REQUIRED ONLY TO INQUIRE FURTHER, TO ASCERTAIN WHETHER OR NOT THE COUNTY WAS AUTHORIZED BY LAW TO SUBSCRIBE FOR STOCK IN THE RAILROAD COMPANY NAMED THEREIN, AND TO ISSUE ITS BONDS IN PAYMENT THEREFOR.

Com'rs of Knox County v. *Aspinwall*, 21 How., 544.
Moran v. *Com'rs of Miami Co.*, 2 Black, 724.
Mercer Co. v. *Hacket*, 1 Wall., 92.
Meyer v. *City of Muscatine*, 1 Wall., 393.
Supervisors v. *Schenck*, 5 Wall., 784.
Pendleton Co. v. *Amy*, 13 Wall., 305.
Lynde v. *The County*, 16 Wall., 13.
Kenicott v. *The Supervisors*, 16 Wall., 464.
Nugent v. *The Supervisors*, 19 Wall., 253.
Town of Coloma v. *Eaves*, 92 U. S. Rep., 490.

VI.

THE RECITALS IN THE BONDS IN QUESTION COMPARED WITH THOSE WHICH HAVE BEEN HELD BY THIS COURT SUFFICIENT TO MAKE BONDS VALID IN THE HANDS OF BONA FIDE HOLDERS.

Bonds in question. "This bond is issued in conformity "with the vote of the electors of said (Warren) county, "cast at an election held on the 23d day of September, A. "D. 1869, pursuant to the authority granted by law, and "upon the order of the Board of Supervisors of said War- "ren County, passed at an adjourned session thereof, be- "gun on the 25th day of January, A. D. 1871."

Bonds passed upon by this Court.

Commissioners of Knox Co. v. *Aspinwall.* "This bond "is issued in part payment of a subscription of $200,000 "by the said County of Knox, to the capital stock, &c., by "order of the Board of Commissioners, in pursuance of "the 3d section of Act, &c., passed by the General As- "sembly of the State of Indiana, and approved 15th Janu- "ary, 1849."

Bissell v. *City of Jeffersonville.* "This bond is issued "by the authority of the Common Council of the City of "Jeffersonville, three-fourths of the legal voters of the "city having petitioned for the same, as required by the "charter."

Moran v. *Com'rs of Miami Co.* "This bond being "issued for a loan of the amount to the county, as author- "ized by an act of the State of Indiana, permitting the "Commissioners of Miami, * * * County to borrow "money."

Van Hostrup v. *Madison City.* The bonds in this case recited that they were issued by "virtue of an ordin-

" ance of the Common Council of the city, passed 2d Sep-
" tember, 1852."

Mercer County v. *Hacket.* The bonds in this case recited that they were issued " under the authority of an act " of Assembly of this Commonwealth, entitled a supple-" ment to an act incorporating the Pittsburgh and Erie " Railroad Company, approved 21st April, 1846, and which " said supplement became a law, 4th May, 1852."

Meyer v. *City of Muscatine.* In this case the bond " does " hereby certify, that by a vote of the legal electors of the " said City of Muscatine, at an election held 13th August, " 1855, in accordance with an ordinance of the Common " Council sanctioning the same," &c.

City of Lexington v. *Butler.* " This certificate is issued " in part payment of a subscription of $150,000 by the " City of Lexington to the capital stock of said * * " Railroad Company, by order of the Mayor and Council " of said City, as authorized by a vote of the people taken " in pursuance of an act of the General Assembly of the " Commonwealth of Kentucky, incorporating said Rail-" road Company, approved 9th January, 1852."

Lynde v. *The County.* "All of said bonds are issued in ac-" cordance with a vote of the people of said county, and in " pursuance of an order of the County Court of Winne-" bago County, legally entered of record in the office of " the County Judge on the 9th day of March, A. D. 1860," &c.

St. Joseph Township v. *Rogers.* This bond recited that it was issued by virtue of a law of the State of Illinois, entitled " An Act to amend the articles of association of " the Danville, Urbana, Bloomington and Pekin Railroad " Company, and to extend the powers of, and confer a " charter upon the same, approved 28th February, 1867,

"and in accordance with a vote of the electors of said "township, at the special election, held 14th August, 1866, "in accordance with said act."

Town of Coloma v. *Eaves.* "This bond is issued under "and by virtue of a law of the State of Illinois, entitled "'An Act to incorporate the Chicago and Rock River "'Railroad Company,' approved 24th March, 1869, and "in accordance with a vote of the electors of said township "of Coloma, at a regular election, held 28th July, 1869, in "accordance with said law," &c.

Marcy v. *Township of Oswego.* "This bond is executed "and issued by virtue of, and in accordance with, an act "of the legislature of said State of Kansas, entitled 'An "'Act to enable municipal townships to subscribe for "'stock in any railroad, and to provide for the payment of "'the same, approved 25th Feb'y, 1870,' and in pursu- "ance of, and in accordance with the vote of three-fifths "of the legal voters of said township of Oswego, at a "special election duly held on the 17th day of May, A. D. "1870."

Humboldt Township v. *Long.* "This bond is issued "for the purpose of subscribing to the capital stock of the "Fort Scott and Allen County Railroad, * * in pursuance "of, and in acordance with an act of the legislature of the "State of Kansas, entitled, &c., * * approved 25th Feb- "ruary, 1870."

Commissioners v. *January.* "This bond is executed "and issued by virtue of, and in accordance with, an act "of the legislature of Kansas, entitled, &c., * * approved "25th Feb'y 1868, and is in pursuance of, and in accord- "ance with, the vote of the majority of the qualified elec- "tors of the county of Johnson, at a regular election, held "on the 6th day of April, 1869."

When the purchaser of the bonds ascertains that the

county had full statute authority to issue the bonds in payment of subscription for stock in a railroad company, upon condition that a majority of the electors of the county, at an election held in pursuance of the statute, vote in favor of the subscription, and is informed by a recital in the bonds that they are issued in conformity with the vote of such electors cast at an election held in such county for that purpose, he has a right to *assume* that such vote was lawfully cast.

The bonds in question declare that they are issued "pursuant to the authority granted by law, in conformity "with the vote of the electors of said county, cast at an "election held on the 23d day of September, A. D. 1869," and "upon the order of the Board of Supervisors of said "Warren County, passed 25th January, 1871," and so, on their face, import a compliance with the statutes granting the power.

The bonds, on their face, are complete and perfect. They exhibit no defect in form or substance. They show a compliance with the grant of power, and the defense offered is merely to show that the recitals, as to an affirmative vote of the electors of Warren county, is not true. This is not admissible under the principles of law established by this Court as to commercial paper in the hands of *bona fide* holders.

In *VanHostrup* v. *Madison City*, it was provided in the charter of the city, in which the grant of power was contained, that no stock should be subscribed, &c., unless it be on the petition of two-thirds of the citizens who are freeholders, &c. It was objected to the bonds that they were issued without the petition of this number of freeholders. The bonds recite on their face *that they were issued by virtue of an ordinance of the common council of the city, passed September 2d, 1852*, and this Court held that this recital *concluded* the city as to any irregularities that

may have existed in carrying into execution the power granted to subscribe for the stock and issue the bonds. The case at bar is, upon the same principle, no less conclusive against the county. In that case, the recital was simply that the bonds were issued by virtue of an ordinance, &c., without adding that it was done in pursuance of the required petition. In the case at bar, the recitals are that the bonds were issued upon the order of the board of supervisors, *and* in conformity with the vote of the electors, thus showing that the order was based on the vote.

In *Supervisors* v *Schenck*, it is held that when a corporation has power, under any circumstances, to issue negotiable securities, the decision of this Court is that the *bona fide* holder has a right to *presume* they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity, in the hands of such a holder, than any other commercial paper. Same doctrine is recognized in *City of Lexington* v. *Butler*.

In *Pendleton Co.* v. *Amy*, the court says that it does not follow, where the legislative authority to issue bonds requires certain things to be first done by the officers or the people of a county, that the bonds can *always* be avoided in the hands of an innocent purchaser, by proof that the county officers or the people, have *not* done, or have *insufficiently* done, the things which the legislature required to be done before the authority to subscribe, or to issue the bonds, should be exercised. A purchaser is not always bound to look further than to discover that the power has been conferred, even though it be coupled with conditions precedent. If the right to subscribe be made dependent upon the result of a popular vote, the officers of the county must first determine whether the vote has been taken as directed by law, and what the vote was.

When, therefore, they make a subscription, and issue county bonds in payment, it may fairly be *presumed*, in favor of an innocent purchaser of the bonds, that the condition which the law attached to the exercise of the power has been fulfilled.

In *Lynde* v. *The County*, it was held that the county judge (in that case) is the officer designated by the statute to decide whether the voters have given the required sanction. He executed and issued the bonds, and the requisite popular sanction is set forth upon their face. It is a settled rule of law that, where a particular functionary is clothed with the duty of deciding such a question, his decision, in the absence of fraud or collusion, is final. It is not open for examination, and neither party can go behind it. Here the bonds are in the hands of a *bona fide* purchaser, and under the circumstances he was not bound to look beyond the averment on their face.

In *Kenicott* v. *The Supervisors*, it is declared by the court that the following propositions may be considered as *settled* in this Court.

1. If an election or other fact is required to authorize the issue of the bonds of a municipal corporation, and if the result of that election, or the existence of that fact, is by law to be ascertained and declared by any judge, officer or tribunal, and that judge, officer or tribunal, on behalf of the corporation, executes or issues the bonds, with a recital that *the election has been held*, or that the fact exists, or has taken place, this will be sufficient evidence of that fact to all *bona fide* holders of the bonds.

2. If there be lawful authority for the municipality to issue its bonds, the omission of formalities and ceremonies, or the existence of fraud on the part of the agents of the municipality issuing the bonds, cannot be urged against a *bona fide* holder seeking to enforce them.

In *St. Joseph Township* v. *Rogers*, the court, in speaking of powers conferred upon municipal corporations to issue bonds to aid in the construction of railroads, says :

"Such a power is frequently conferred to be exercised in a special manner, or subject to certain regulations, conditions or qualifications; but if it appears that the bonds issued show by their recitals that the power was exercised in the manner required by the Legislature, and that the bonds were issued in conformity with those regulations, and pursuant to those conditions and qualifications, proof that any, or all, of those recitals are incorrect, will not constitute a defense to the corporation in a suit on the bonds or coupons, if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulation, condition, or qualification, which it is alleged was not fulfilled."

In *Town of Coloma* v. *Eaves*, the court say:

"At the outset, it is to be observed that the question is not between the town and its own agents; it is rather between the town and a person claiming through the action of its agents. The rights of the town as against its agents may be very different from its rights as against parties who have honestly dealt with its agents as such, on the faith of their apparent authority."

In the above case the question as to who is to decide whether the requirements of the law, prior to a subscription to the stock of a railroad company, and to the issuing of bonds in payment therefor, have been met, is most fully and elaborately discussed, and it is settled that this power is given by law, not to the courts, after the bonds are issued and put upon the market, but to the municipal authorities, and that their decision thereon is in the nature of a judgment, binding on the county. It is there held that the *recitals in the bonds* are such a decision, and that beyond those a *bona fide* purchaser is not bound to look for evidence of the existence of things *in pais*. He is bound to know the law conferring on the municipality power to give the bonds on the happening of a contingency; but whether that has happened or not is a question of fact, the decision of which is by law confided to others.

In *Humboldt Township* v. *Long*, the exact question was raised which was attempted to be raised in the case at bar, that is, whether the bonds are invalid because of the fact that the election was held within less than thirty days after the day of the order calling it. The court thus resolved it :

" By the provisions of the act under which the bonds purport to be issued, the board of county commissioners, who caused the bonds to be issued, were constituted the authority to determine whether the conditions of fact, made by the statute precedent to the exercise of the authority granted to execute and issue the bonds, had been performed, and their recital in the bonds issued by them was conclusive in a suit against the township brought by a *bona fide* holder. We have often so decided, and it ought to be regarded a fixed rule. Applying it to the solution of the question now before us, it is plain that the bonds are not invalid, because all the notice of the popular election was not given, which the legislative act directed. The election was a *step* in the process of the execution of the power granted to issue bonds in payment of a municipal subscription to the stock of a railroad company. It did not itself confer the power. Whether that step had been taken or not, and whether the election had been regularly conducted, with sufficient notice, and whether the requisite majority of votes had been cast in favor of a subscription, and consequent bond issue, were questions which the law submitted to the board of county commissioners, and which it was necessary for them to answer before they could act. In the present case, the board passed upon them and issued the bonds, asserting by the recitals that they were issued 'in pursuance of and in accordance with the act of the Legislature.' Thus the plaintiff below took them, without knowledge of any irregularities in the process through which the legislative authority was exercised, and relying upon the assurance given by the board, that the bonds had been issued in accordance with the law. In his hands, therefore, they are valid instruments."

VII.

THE CHARACTER AND EFFECT OF THE DECISION OF THE SUPREME COURT OF ILLINOIS UPON THE ISSUING OF THE BONDS IN QUESTION.

The case of *Harding* v. *The Rockford, Rock Island, and St. Louis Ry. Co. et als.*, commenced by bill for an injunction, in the Circuit Court of Warren County, and in which an injunction was granted and afterwards dissolved, as is herein in another place mentioned, was, on dismissal thereof, appealed to the Supreme Court of Illinois, and the decision of said court thereon is reported in 65 Ill. Repts., 90.

This was a *direct proceeding*, by bill, for an injunction to restrain the issuing of the bonds, filed before the bonds were issued. The ground alleged in the bill, as a basis for an injunction, was, that the question of subscribing to the stock of the railroad company had not been submitted to the voters of the county in the manner prescribed by law; that thirty days' notice of the election was not given, and that, therefore, although there had been an election, and a majority of the voters had voted in favor of the subscription, it conferred no authority on the Board of Supervisors to subscribe for stock in the company, and issue bonds in payment therefor.

The only question considered by the court was, whether or not the omission to give notice for thirty days was fatal to the rightful exercise of the power to issue the bonds. After an elaborate discussion of the effect and relation of the two acts of the Legislature, first in this argument referred to, the court concludes that the election was invalid for want of sufficient notice, and conferred no power to make the subscription and issue the bonds, reversed the decree of the court below, and directed it to grant the prayer of the bill.

This was a *direct proceeding* by a citizen and tax payer of the county against his agents, the Board of Supervisors, to inquire into the facts previously to the execution of the power, commenced by him *before the rights and interests of third persons had attached.* It is competent to do this, and the decision of the board might not be conclusive that all the facts authorizing the exercise of the power existed. But after the proper authorities have ascertained and determined that the facts authorizing the exercise of the power exist; after they have executed the power, subscribed for the stock, and issued the bonds, and the bonds have come into the hands of innocent holders for value, then it would be too late, even in a *direct* proceeding to call in question the execution of the power; much less can it be called in question, to the prejudice of a *bona fide* holder of the bonds, in a *collateral* way.

Comm'rs of Knox County v. *Aspinwall*, 21 How., 544.

This court has repeatedly held that the question passed upon by the Supreme Court of Illinois in the *Harding* case, is one simply of *irregularity* in the execution of a power, and not one of power itself. The *power* was given by the Legislature, and it was only left to the county to determine, by a majority vote of its electors, whether the Board of Supervisors might act under the power; and the *fact* whether or not the county, by such a vote, had so determined, was one to be found by the Board of Supervisors before they could exercise the power; and having so found it, and so declared on the face of the bonds, it is conclusive in favor of *bona fide* holders of the bonds.

Town of Venice v. *Murdock*, 92 U. S. Rep., 500.

It may be sufficient to say that the rights of *bona fide* holders of the bonds in question, having no notice of any irregularities in their issue, were not before the Supreme

Court of Illinois in the *Harding* case, and it cannot be inferred therefrom that said court would hold the bonds void in the hands of such a holder.

But, if it could be shown that the Supreme Court of Illinois would hold the bonds void in the hands of such a holder, such a decision would not be binding on this court. It would be in direct conflict with the decisions of this court herein cited. Such a decision would not be a judicial construction of a statute, nor even an "attempt at interpretation" of a statute. It would be but the assertion of a general principle, which would apply as well to the execution of powers granted by private persons as to the execution of powers granted by the Legislature to county authorities.

Town of Venice v. *Murdock*, 92 U. S. Rep., 501.

VIII.

WAS THE ISSUING OF THE BONDS IN QUESTION, UNDER THE CIRCUMSTANCES SHOWN, PROHIBITED BY THE CONSTITUTION OF ILLINOIS?

The following clause of the Constitution of Illinois went into force on the 2d day of July, 1870.

"*No county, &c., shall ever become subscriber to the capital stock of any railroad corporation * * ; provided, however, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions, where the same have been authorized, under existing laws, by a vote of the people of such municipalities, prior to such adoption.*"

We have not been able to get a copy of the brief to be filed on behalf of the county, but we have been informed it

will claim, that the above article of our constitution absolutely prohibited the issuing of the bonds in question, on the ground that they were not authorized by a vote of the people; and that the decision in the *Harding* case will be relied upon as settling the fact, that there was no such election as that contemplated by this proviso.

What is the prohibition? "No county shall *ever become* a subscriber", &c. There is in fact no infraction of this article, in the case at bar. There was no subscription by the County of Warren to the capital stock of the railroad company, made *after* this article of the constitution became operative. It is entirely *prospective* in its legal effect. It does not *purport* to interfere with subscriptions to such stock made *before* its adoption, whether the same were authorized, under then existing laws, by a vote of the people, or not. The whole scope, intention, force and meaning of the proviso is this; *first*, a general prohibition; *second*, a qualification thereof, to meet a class of cases, where subscriptions, at the time of its adoption, had already been authorized, under existing laws, by a vote of the people, and had not yet been made. In such cases, they may be made, notwithstanding the general prohibition. But where the subscription had been already made, the fact accomplished, whether under the authority of existing laws, or by a vote of the people, or not, was a matter that the new constitution did not undertake to deal with. It left all such cases to stand or fall by the laws and constitutions in force at the time the acts were done. To claim that this article of the constitution in any manner affects the case at bar, is to insist upon giving it retroactive force.

The *case finds*, that the Board of Supervisors, in March 1870, declared that the election, held 23d Sept., 1869, had resulted in favor of the subscription, and ordered their chairman, in pursuance of the vote cast at said election, to

subscribe $200,000 to the stock of said company, which subscription was made by the chairman of said Board, in the name of said county, in March 1870, in pursuance of said order of said Board.

There being full authority of law for the county to subscribe for this stock, with the consent of a majority of the electors of said county, expressed by their votes at an election ordered by the Board of Supervisors; the votes at such an election having been canvassed by the Board, and declared to be in favor of the subscription; the Board having ordered the subscription to be made, and the subscription having been made in pursuance of said vote, and of said declaration and order; and the railroad company having acted upon the subscription as legally made and valid, and expended money and contracted debts on the strength thereof, as is to be clearly presumed, the subscription of the county became a valid and binding *contract* with the railroad company, and the people of Illinois could not impair its obligation by a constitution, any more than they could by statutes. This is a fundamental principle of law, and in such a case, it would not be competent, even in a direct proceeding, to inquire into the fact, whether or not the Board of Supervisors declared correctly in relation to the validity of the election.

It will be noticed also, that this article of the constitution relates solely to *subscriptions for stock*, and has no relation whatever to the issuing of bonds in payment of subscriptions for stock made under *other* constitutions, and under laws in force prior to its adoption.

But supposing it be conceded, for the sake of the argument, that this article of the constitution covers subscriptions made prior to its adoption, then how does it affect the bonds in question, under the facts shown? Was the subscription of Warren County to the stock of the railroad company, made in March, 1870, authorized,

under existing laws, by a vote of the people of said county, prior to the adoption of this article of the constitution? There is no question that *laws* existed, conferring ample *power* to the county to make the subscription. Did the people of the county, acting under these laws, by their vote cast at an election held prior to the adoption of said article, *authorize* the subscription? Who was to decide this question? *Not the courts*, but the board of supervisors of the county. That is the tribunal, provided by law, to determine this question, once for all, and it must settle it before it can issue the bonds. It did settle the question that the people, by their vote cast at an election ordered by said board, and held 23d September, 1869, had authorized the board to make the subscription. The fact so found and determined by the board, is declared to the world in each bond issued, as is shown by the recitals therein. As against a *bona fide* holder of these bonds, the county cannot be heard to deny this fact. It is a fact as firmly and conclusively established in his favor as though it were the solemn adjudication of the Supreme Court of Illinois. Under the decisions of this court, above cited, it is *conclusive*. The holder of the bonds in question brings himself then, fully within the *proviso*, and shows that the subscription to the stock of the company was duly authorized, under the existing laws, by a vote of the people of Warren County, cast prior to the adoption of this prohibitory article of the constitution.

IX.

THESE BONDS WERE DULY REGISTERED IN THE STATE AUDITOR'S OFFICE UNDER THE ACT OF 1869, AND THE AUDITOR'S CERTIFICATE ENDORSED ON EACH BOND.

Before this could be done under the statute authorizing the registration, the subscription creating the debt must

first have been submitted to an election of the legal voters of the county, under the provisions of the law conferring the power to subscribe for stock. A majority of the legal voters living in the county must have voted in favor of the subscription, and the proper officer must have certified to the auditor, *under oath*, that all the preliminary conditions in that act required to be done to authorize the registration of the bonds *had been complied with*. Here is another—a double—determination under the law, that the facts preliminary to the proper execution of the power authorizing the issuing of the bonds, existed; and a purchaser of bonds upon which the State Auditor's certificate of registration is found, *even without the recitals on the face of the bonds*, would have a right to presume, conclusively, that all the facts showing due and lawful exercise of the power, existed. This court has laid some stress on the fact of this registration; and it is obvious, from the reading of the law authorizing the registration, that much more force and effect might properly be given to this act than has heretofore been found necessary to give to it. Certainly, a *bona fide* purchaser of such bonds *ought* to have the right to safely assume, from the auditor's certificate, that all the formalities in the execution of the power had been complied with.

Town of Coloma v. *Eaves*, 92 U. S. Rep., 490.

Marcy v. *Township of Ohio*, 92 U. S. Rep., 639.

Commissioners v. *January*, 94 U. S. Rep., 206.

X.

IT WAS CLAIMED IN THE COURT BELOW THAT THE PEOPLE OF WARREN COUNTY COULD DO NO MORE THAN THEY DID DO TO PREVENT THE ISSUING OF THE BONDS IN QUESTION; THAT THEY FILED, AND SUCCESSFULLY PROSECUTED, A BILL TO FORBID THEIR ISSUE.

In the first place, it may be said, that the people of the county did *nothing* to *prevent* the issue of the bonds, but, on the contrary, did all they could do to make it. At an election held 23d September, 1869, sixteen months before the bonds were issued, by a vote of 1775 against 975, they voted to subscribe for $200,000 stock in the railway company; that soon after the election was held, the votes were duly canvassed and filed in the office of the clerk of the county; that on the 16th of March, 1870, the Board of Supervisors of the county declared that the vote had resulted in favor of the subscription, and ordered their chairman to subscribe the $200,000 to the stock of the company, which subscription was duly made in March, 1870; that on the 18th of July, 1870, one A. C. Harding, a citizen and tax payer of the county, filed his bill against the county officers and railroad company, asking for an injunction to prevent the subscription (which had already been made), from being made, and the bonds from being issued, and in August, 1870, he obtained his injunction; that this injunction remained in full force until the 23d day of January, 1871, when, *on motion of the defendants*, it was dissolved; that on the 25th day of January, 1871, the Board of Supervisors of the county being no longer delayed by the restraining order of the court, ordered that the bonds be issued in payment of their said subscription for stock, and the bonds were thereupon, on that day,

pursuant to the authority of the statute, pursuant to the vote of the people, and pursuant to the order of the Board of Supervisors, duly executed and delivered to the railway company in payment of the subscription of the county for stock in the company. Thus it appears, from the record in this case, that the county, and its duly constituted authorities, did all that could be done to make the subscription to the stock of the company, and to issue the bonds of the county in payment therefor.

In the next place, the said Harding, the only resident of the county shown to have made any effort to defeat the will of his neighbors, did not obtain his injunction until August, 1870, about eleven months after the vote was taken, and five months after the Board of Supervisors had declared that the election had resulted in favor of subscription, and directed the chairman of the board to make the subscription. He did not prosecute this suit effectually or successfully. When his injunction was dissolved, 23 Jan'y, 1871, he did not have his bill dismissed by the court for want of equity, as it was competent for him to do, under the chancery practice in Illinois, and then take an appeal, and *thus keep his injunction in full force.* It is true, that four days after his injunction was dissolved, he prayed an appeal from the order dissolving the injunction, but this was refused, for the obvious reason that in no case does an appeal lie from an interlocutory order of the court. The whole case must first be disposed of. Ten days after the injunction was dissolved, the bill was dismissed and an appeal was taken, but that did not revive the injunction; to keep that in force, the bill should have been dismissed *at the time the injunction was dissolved.* So it appears, that Mr. Harding did not do what he might have done to prevent the issuing of the bonds. He let go his grip just at the moment when he had it in his power to make it effectual, and the pretense that he did all that could be done, to

prevent the issuing of the bonds, fails him, and makes no basis for alleged hardship, or for tears. While it is true, therefore, that he *filed* a bill to prevent the issue of the bonds, he did not *successfully* or *properly prosecute* it, if in fact the real purpose of the bill was to prevent the issue of the bonds.

It may be contended, on behalf of the county, that the finding of the court below, that the subscription of the county to the stock of the railroad company, *was made in March, 1870*, is not of such an affirmative character as will justify this Court in acting upon it as a *fact*. The Court found that the bonds were delivered to the company, "in "payment of a subscription of a like amount to the stock "of said company, which *purported* to be made in March, "1870, in the name of said county, by the *chairman of said* "*board*, in pursuance of an order of said board, as herein- "after stated."

In this connection, the Court further found that, "on "March 16th, 1870, the said board declared that the elec- "tion had resulted in favor of the subscription, and ordered "David Turnbull, their chairman, to subscribe two hun- "dred thousand dollars to the stock of said company."

There would seem to be a pretty violent presumption from these findings, that the subscription was in fact made at the time it purported to be made. Such a subscription, at that time, would be in precise accordance with the result of the election, as declared by the board, in precise obedience to the order of the board based thereon, and in precise conformity to the second section of the act of 25th March, 1869, which provides that the subscriptions may be made, on behalf of the county, by an agent appointed by the board of supervisors.

The purpose of such a contention obviously would be, to try and make effective the constitutional prohibition adopted 2d July, 1870. The argument is, if the *subscription*

was not made until *after* this prohibitory article took effect, then the power to subscribe was abrogated. No stress was laid on this point at the trial below, both parties and the court acting upon the fact that the subscription was made at the time it purported to be made; and the evidence produced to the court, showing a subscription made in March, 1870, was admitted, so far as the record shows, without objection, and made, at least, *prima facie* proof of the fact. No attempt was made by the county to rebut or overcome the evidence thus admitted; and it is too late now, upon the record as it stands, to claim that the subscription was not made at the time it purports to have been made.

But even if it could be shown that the subscription was not, in fact, made until after 2d July, 1870, then it avails the county nothing, for the reason, that under the *proviso* to the constitutional article, the subscription could be made *after* its adoption, as well as before, if authorized, under existing laws, by a vote of the people, prior to its adoption.

On the 16th of March, 1870, and before the adoption of the Constitutional Amendment, this was declared by the Board of Supervisors, to have been done; and their finding, adjudication and declaration, in favor of the holder of these bonds, imports *absolute verity*, as has already been shown.

This case, and the cases of *Marcy* v. *The County of Warren*, and *Post* v. *The Same*, numbered respectively 253, 254 and 255, on the docket of this court, were tried together in the court below, and the special finding of that court is the same in each case.

In the trial of these cases in the court below, Charles M. Osborn, Esq., counsel in the *Marcy* and *Post* cases, by arrangement, made the principal argument on the questions raised by the county upon the statutes of 4th, 25th and 26th of March, 1869, above mentioned, their constitutionalty,

their relation to each other, and their force and effect as granting power to issue the bonds in question.

With the argument then, and in this Court to be, made by Mr. Osborn, on these questions, we are entirely satisfied; and with his permission, and for the purpose of avoiding repetition, we adopt it as our argument upon those questions, and respectfully ask the court to consider it in connection with the foregoing brief on the other questions arising in this case.

We submit this brief in the full confidence that every material question in the case has already been decided by this Court in favor of the validity of the bonds in question, and that the judgment of the court below is in accordance with both law and justice.

ISAAC G. WILSON.
SANFORD B. PERRY.